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IN THE
Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,

v.

PATRICIA HEATON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred by refusing to review a remand order and holding, contrary to numerous other courts of appeals, that a district court's invocation of 28 U.S.C. § 1447(c) as the basis for a remand order constitutes "magic words" that insulate that order from appellate review, even though it is clear from the face of the remand order that it could not have been based on § 1447(c).

LIST OF PARTIES
AND
CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings before the Fifth Circuit are listed in the Appendix at Pet. App. 1a.

Pursuant to Supreme Court Rule 29.6, petitioner states as follows:

Monogram Credit Card Bank of Georgia is a wholly-owned subsidiary of General Electric Capital Corporation. General Electric Capital Corporation is a wholly-owned subsidiary of General Electric Capital Services, Inc. General Electric Capital Services, Inc., is a wholly-owned subsidiary of General Electric Company, which is a publicly held corporation.

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MONOGRAM CREDIT CARD BANK OF GEORGIA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monogram Credit Card Bank of Georgia ("Monogram") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 231 F.3d 994 and is reprinted at Pet. App. 1a-12a. The opinion of the district court is reprinted at Pet. App. 20a-22a.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2000. A timely petition for rehearing was denied on January 5, 2001. The court of appeals held that, pursuant to 28 U.S.C. § 1447(d), it lacked subject matter jurisdiction to review the order of the district court remanding this case to state court. That ruling is the subject of the instant petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1447(c) and (d), as well as 28 U.S.C. § 1367(c)(3). Those provisions are reproduced at Pet. App. 26a-28a.

STATEMENT OF THE CASE

This petition presents an enduring and acknowledged conflict among the Circuits regarding the scope of appellate jurisdiction to review a district court order remanding a case to state court. Review of remand orders is governed by 28 U.S.C. § 1447(d), which precludes appellate review *only* of those remand orders issued pursuant to 28 U.S.C. § 1447(c). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). In the decision below, the Fifth Circuit reaffirmed its unique rule that a district court's invocation of 28 U.S.C. § 1447(c) in a remand order constitutes "magic words" that conclusively insulate that order from appellate review. The Fifth Circuit thus had to ignore what was

evident on the face of the order: the remand order in this case could not have been based on 28 U.S.C. § 1447(c) because the district court dismissed plaintiff's federal claim as a predicate to its remand order.

As the Fifth Circuit acknowledged, Pet. App. 8a, its magic words approach is contrary to the rule in other circuits, which have uniformly held that courts of appeals must determine independently the basis of the district court's remand order, after review of the surrounding circumstances. *See, e.g., Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996); *Carvel v. Thomas and Agnes Carvel Foundation*, 188 F.3d 83 (2d Cir. 1999); *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993); *see also In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 709 (7th Cir. 1992); *Engelhardt v. Paul Revere Life Insurance Co.*, 139 F.3d 1346, 1350-51 (11th Cir. 1998); *Executive Software North America, Inc. v. United States District Court for the Central District of California*, 24 F.3d 1545, 1549 (9th Cir. 1994). Moreover, the Fifth Circuit's decision is flatly at odds with numerous decisions from this Court and the other courts of appeals in analogous contexts holding that a district court's characterization of its own actions is not conclusive of the jurisdiction of a reviewing court. *See, e.g., Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Sullivan v. Finkelstein*, 496 U.S. 617 (1990); *Sampson v. Murray*, 415 U.S. 61 (1974); *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814 (1st Cir. 1982) (Breyer, J.).

A. Factual Background

In May 1998, plaintiff Patricia Heaton filed a class action complaint against Monogram in Louisiana state court, alleging principally that Monogram's credit card late fees, though permitted by the law in Monogram's home State of Georgia, exceeded the limit prescribed by Louisiana's Consumer Credit Law. The threshold legal issue posed by the complaint was whether Monogram is a "state bank" under the Federal Deposit Insurance Act ("FDIA"). If Monogram is a state bank, the fees it charged were indisputably lawful under federal law and this Court's precedent, because a state bank has a federal statutory right under Section 27 of the FDIA to assess fees and interest charges (including late fees) in any State that would be lawful in its home State. *See* 12 U.S.C. § 1831d(a) (permitting a "state bank" to charge interest "at the rate allowed by the laws of the State, territory, or district where the bank is located," "notwithstanding any State constitution or statute, which is hereby preempted for the purposes of this section"); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996); *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992).

B. Federal District Court Proceedings

Monogram removed the case to federal court, asserting that plaintiff's claims under Louisiana law were completely preempted by Section 27 of the FDIA. *See* 12 U.S.C.

§ 1831d.[1] Plaintiff moved to remand, arguing that Monogram could not invoke complete preemption under the FDIA because Monogram, despite having over $670 million in deposits from its affiliates, was not "engaged in the business of receiving deposits," and thus was not a "state bank" under the FDIA. *See* 12 U.S.C. § 1813(a)(2) (defining "state bank" as a banking institution that is "engaged in the business of receiving deposits" and is "incorporated under the laws of any State"). Monogram noted that plaintiff's position contradicted the determination of the Federal Deposit Insurance Corporation ("FDIC"), the expert agency charged with interpreting and enforcing the FDIA. The FDIC had considered Monogram to be a state bank ever since it approved Monogram's application for deposit insurance in 1988, and the FDIC had concluded expressly in a September 25, 1998 confirmation letter filed with the district court that Monogram was a state bank under the FDIA.[2]

The district court initially denied plaintiff's motion for remand, holding that Monogram was a state bank under the FDIA and that plaintiff's claims were completely preempted. *See* Pet. App. 2a-3a; *see also id.* at 13a-16a. The case was then re-assigned to a newly appointed judge, who denied

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[1] Monogram also contended that the district court had diversity jurisdiction. In the remand order that is on review, the district court concluded that plaintiff had not satisfied the amount in controversy requirement.

[2] More recently, the FDIC issued *General Counsel's Opinion No. 12, Engaged in the Business of Receiving Deposits Other Than Trust Funds*, 65 Fed. Reg. 14568 (Mar. 17, 2000), which provides a thorough analysis of the FDIC's long-standing interpretation that credit card banks (and other institutions) that accept deposits from a parent or affiliate but do not accept deposits from the general public are still "engaged in the business of receiving deposits" and thus are state banks under the FDIA. *Id.* at 14572.

plaintiff's motion to certify an appeal of the order denying a remand, specifically holding that plaintiff had not shown a "'substantial ground for difference of opinion as to whether defendant is a state bank.'" Pet. App. 3a (quoting order). Plaintiff then moved successfully to amend her complaint to assert a federal claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1637(c)(3)(B). Monogram eventually filed a motion for summary judgment on all of plaintiff's claims, and plaintiff's response was deferred to enable her to conduct discovery.

More than a year after plaintiff's motion to remand had been denied, and following the completion of substantial discovery, plaintiff filed a motion to reconsider the denial of her remand motion. She reiterated the same "state bank" arguments that had been previously rejected, adding only the argument that the FDIC's September 25, 1998 confirmation letter was not entitled to deference because Monogram's attorneys had participated in its preparation.

At a hearing on plaintiff's motion, Monogram's counsel argued that the TILA claim prevented remand.[3] This argument prompted the court to suggest that plaintiff could voluntarily dismiss that claim. November 10, 1999 Tr. at 25. Later that same day, plaintiff filed a motion voluntarily to dismiss her TILA claim with prejudice.

The court dismissed the TILA claim with prejudice and, in a separate order that acknowledged the TILA dismissal, remanded the remaining claims to state court. The latter

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[3] *See Burks v. Amerada Hess Corp.*, 8 F.3d 301, 304 (5th Cir. 1993) ("a district court has no discretion to remand a matter in which a federal-law claim still exists").

order held that Monogram is not a "state bank" and that plaintiff's claims were thus not completely preempted under the FDIA. Notwithstanding plaintiff's assertion – and the district court's dismissal with prejudice – of the federal TILA claim, the district court concluded that the court "does not have federal question jurisdiction" and purported to remand the case "pursuant to 28 U.S.C. § 1447(c)." Pet. App. 22a.

C. Fifth Circuit Proceedings

Monogram sought expedited review of the remand order in the Fifth Circuit. Citing settled case law from other courts of appeals, Monogram argued that neither the district court's statement that the court "does not have federal question jurisdiction" nor its statement that remand was "pursuant to 28 U.S.C. § 1447(c)" conclusively determined reviewability. Pet. App. 22a. In this case, as was evident from the face of the remand order, the district court had dismissed plaintiff's TILA claim *with prejudice*, an action that could not have been taken unless the court had subject matter jurisdiction. Monogram argued that the remand order thus could not have been premised on the absence of subject matter jurisdiction, but instead was necessarily a discretionary remand of pendent claims following dismissal of federal claims, *see* 28 U.S.C. § 1367(c)(3); *Cohill*, 484 U.S. at 348, which was unquestionably appealable.

The Fifth Circuit disagreed and, pursuant to 28 U.S.C. § 1447(d), dismissed Monogram's appeal for lack of jurisdiction. The court of appeals held that the district court's characterization of its own order is conclusive for purposes of appellate jurisdiction. The court stated that "the district court is the final arbiter of whether it has jurisdiction to hear the case," *see* Pet. App. 5a (internal quotation and

citation omitted), and, because the district court "stated a § 1447(c) basis for remand," its remand order was insulated from appellate review by § 1447(d). *Id.* (citing *Thermtron*, 423 U.S. at 345-46). The Fifth Circuit expressly acknowledged that Monogram's argument to the contrary was firmly grounded in the "decisions of other circuits," but noted that prior Fifth Circuit cases had adopted a "'magic words'" approach to § 1447(d) that prevents that Circuit from examining the actual basis of the remand once the district court expressly mentions § 1447(c) or the absence of subject matter jurisdiction. *See* Pet. App. 8a (quoting *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994)). The Fifth Circuit further held that unless the district court "clearly and affirmatively" relies on a non-1447(c) basis for remand, the court of appeals lacks jurisdiction. Pet. App. 10a. Since the remand order did not expressly rely on a non-1447(c) basis for remand, the remand order was not reviewable.

The Fifth Circuit recognized, however, that the district court could not have dismissed the federal TILA claim with prejudice if the district court did not have jurisdiction over the case. The court of appeals accordingly held that the dismissal of the TILA claim with prejudice was "void," and that Monogram "may file another petition for removal based on the TILA claim once this case is returned to state court." Pet. App. 12a & n.6.

The morning after the panel's decision was released, Monogram removed the case again based on the TILA claim. Unbeknownst to Monogram, however, plaintiff had obtained from the state court an *ex parte* order dated the previous day dismissing any TILA claim still in the case. Plaintiff then sought to remand for lack of subject matter jurisdiction. Disregarding the Fifth Circuit's express assumption that

Monogram would receive a federal forum, the district court once again remanded the case to state court.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's holding that a district court's invocation of § 1447(c) in a remand order constitutes "magic words" that insulate that order from review reaffirms and deepens a long-standing conflict between the Fifth Circuit on one side and all other Circuits that have addressed the issue on the other. Seven other Circuits have held that a district court's characterization of its own remand order is not conclusive of the order's reviewability, and that an appellate court must engage in an independent analysis of the district court's actions to determine appellate jurisdiction. This Court has applied that same rule in analogous contexts. The Fifth Circuit's sustained departure from the rule prevailing in this Court and the other courts of appeals merits this Court's review.

Had the Fifth Circuit undertaken the required independent review, it would have concluded from the face of the district court's remand order that the order was reviewable. The district court purported to remand for lack of subject matter jurisdiction, as permitted by § 1447(c), but it did so only after dismissing with prejudice a federal statutory claim plaintiff had previously asserted. Such an action (as the Fifth Circuit acknowledged) requires subject matter jurisdiction, and that jurisdiction, in turn, makes any remand after dismissal of the federal claim both discretionary and appealable. *See Cohill*, 484 U.S. 343; *see also infra* at 25 n.12. Numerous other courts of appeals have acknowledged that similar remand orders do not fall within the bar of § 1447(d).

The Fifth Circuit's approach has important consequences for courts and litigants alike. By letting the district court's characterization of its own order determine reviewability, the Fifth Circuit facilitates disparate results and disrespect for the judiciary that appellate review is designed to prevent. Moreover, the Fifth Circuit's approach frustrates Congress' intent that discretionary remands be reviewable, and it deprives defendants of their right to have their case resolved in a federal forum. Thus, regardless of the importance of the particular remand order on review, the conflict presented by the decision below warrants this Court's review.

In this case, the significance of the underlying remand order renders this Court's review imperative. The district court held that Monogram is not a "state bank" under the FDIA despite the fact that the FDIC, which has regulatory and interpretive authority over the FDIA, has treated Monogram as a "state bank" since 1988, when it issued an order granting Monogram deposit insurance. Indeed, the FDIC submitted a letter to the district court prior to the remand order reaffirming that Monogram is a state bank under the FDIA and, recently, issued a general counsel's opinion, approved by the FDIC's Board of Directors, that expressly rejects the district court's opinion and terms it "irrational."[4] The FDIC has warned that the district court's erroneous resolution of the state bank issue "may affect hundreds of similarly situated FDIC-insured institutions processing billions of dollars in transactions" and "may literally open the floodgates of litigation and deluge the institutions regulated by the FDIC with a torrent of similarly

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[4] *General Counsel's Opinion No. 12*, 65 Fed. Reg. at 14571.

frivolous suits."[5] *See also* Fifth Circuit Brief of Amicus Curiae Conference of State Bank Supervisors, *et al.*, at 5, 8 (filed March 29, 2000) (noting that the district court's decision "hinders the safety and soundness of our banking system" and "threatens to destroy . . . the competitive equality that Congress has established between State banks and national banks").

The Fifth Circuit forthrightly conceded that Monogram's appeal presents "significant questions of law concerning the interpretation of the FDIA and the ability of courts to 'second-guess' the FDIC's determinations about whether financial institutions are 'state banks' under the FDIA." Pet. App. 11a. The Fifth Circuit declined nevertheless to resolve those questions, holding that the district court's utterance of "magic words" prevented appellate review. This petition thus vividly illustrates the serious consequences of the Fifth Circuit's unique, narrow view of its appellate jurisdiction. Accordingly, this Court should grant this petition and resolve the conflict over the scope of appellate jurisdiction to review remand orders under 28 U.S.C. § 1447(d).

A. The Fifth Circuit's Reliance on a "Magic Words" Doctrine to Determine the Reviewability of Remand Orders Conflicts with the Decisions of Every Other Circuit to Have Considered the Issue.

The language of 28 U.S.C. § 1447(d) provides broadly that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or

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[5] Memorandum of Points and Authorities in Support of the Federal Deposit Insurance Corporation's Motion for Leave to Intervene as a Party Defendant at 4 (filed Nov. 22, 1999).

otherwise." This Court has repeatedly made clear, however, that § 1447(d), despite its broad language, prohibits appellate review of *only* those remand orders actually issued pursuant to § 1447(c), namely remands on the ground of "any defect" or due to "lack of subject matter jurisdiction."[6] *See Thermtron*, 423 U.S. at 345-46; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Quackenbush*, 517 U.S. at 711-12. A remand order is not issued pursuant to § 1447(c), and is thus reviewable, when, for example, the remand order is based on concerns of docket management, *see Thermtron*, 423 U.S. at 345-46, or the abstention doctrine, *see Quackenbush*, 517 U.S. at 711-12, or – more critically for the instant petition – when the remand order involves the discretionary remand of supplemental state claims following the dismissal of federal claims, *see Cohill*, 484 U.S. at 348.

In the decision below, the Fifth Circuit reaffirmed its own precedent that treats the district court's mere invocation of § 1447(c) or the words "lack of subject matter jurisdiction" in a remand order as "magic words" that conclusively establish that the order was issued pursuant to § 1447(c) and is thus unreviewable under § 1447(d). *See* Pet. App. 8a; *see also Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994) ("The magic words 'this case does not contain a federal claim' rendered the district court's remand order unreviewable."); *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211, 212 n.1 (5th Cir. 1987) (per

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[6] At the time of *Thermtron*, § 1447(c) provided for remand if the case was removed "improvidently or without jurisdiction." *See Thermtron*, 423 U.S. at 342; *see also Cohill*, 484 U.S. at 346 n.2. In 1988, Congress modified that language to permit remand "on the basis of any defect in removal procedure" or if the district court "lacks subject matter jurisdiction." In 1996, the reference to "removal procedure" was deleted.

curiam) ("orders which recite the magic words [improvidently and without jurisdiction] . . . are 'not subject to challenge in the court of appeals by appeal, by mandamus or otherwise'"); *Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023, 1026 (5th Cir. 1991) ("incantation" of the phrase, "lacks subject matter jurisdiction" has "magical effect").[7] In so doing, the Fifth Circuit resolved a question posed in *Thermtron*, but did so in a way that conflicts with both the logic of *Thermtron* and, as the Fifth Circuit recognized, numerous "decisions of other circuits" -- indeed, it directly conflicts with the decisions of *seven* other Circuits.

In *Thermtron*, this Court held that Congress intended § 1447(d) to immunize only those remands listed in § 1447(c), and did not "intend[] to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." 423 U.S. at 351. In discussing the ramifications of the majority's approach, the *Thermtron* dissent hypothesized a case in which the district court "state[s] that it finds no jurisdiction, using the rubric of § 1447(c), but the papers plainly demonstrate such a conclusion to be absurd." *Id.* at 357 (Rehnquist, J., dissenting). In that situation, the dissent argued, "[i]f the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand." *Id.* This case squarely presents the problem identified by the now-Chief Justice, and the Fifth Circuit's

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[7] *See also Smith v. Texas Children's Hosp.*, 172 F.3d 923, 925-26 (5th Cir. 1999); *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 408 (5th Cir. 1991).

refusal to review the district court's order is thus at odds with *Thermtron*.

Seven courts of appeals have followed the logic of *Thermtron* and rejected an approach that gives conclusive effect to the district court's characterization of its own order. In *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), for example, plaintiff brought a tort suit against a government contractor and a federal official in state court. The case was removed to federal court, and, shortly thereafter, the claims against the federal official were dismissed. After determining that the remaining defendant was not entitled to any immunity from suit, the district court remanded the case to state court. The remand order stated explicitly that "[w]ithout the federal defendant there is no longer any basis for federal jurisdiction because diversity does not exist among the remaining parties"; it also stated expressly that the action is remanded "pursuant to 28 U.S.C. § 1447(c)." *Id.* at 1452 (Phillips, J., opinion of the court with respect to subject matter jurisdiction).

Despite the district court's invocation of § 1447(c), the Fourth Circuit exercised jurisdiction over the appeal and vacated the remand order. Explicitly rejecting the Fifth Circuit's magic words approach,[8] the majority held that "powerful policy considerations and persuasive decisional

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[8] The dissent in *Mangold* expressly invoked the Fifth Circuit's magic words approach, arguing that the words in the district court's order "'are indeed magic ones: the order is proof against review even if it merely 'purports' to remand on the ground quoted.'" *Id.* at 1456 (Michael, J., dissenting) (quoting *Richards*, 812 F.2d at 212 n.1). The dissent argued that "where, as here, a district court ordered remand (even erroneously) using the magic words of § 1447(c), review of that order was prohibited under § 1447(d)." *Id.* at 1458

authority support our power – and responsibility – to look past contextually ambiguous allusions and even specific *citations* to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand." *Id.* at 1450 (emphasis in original). The majority emphasized that "neither the citation of § 1447(c) nor the failure to cite it as presumed authority for a remand is conclusive of the real question: whether one of its two grounds is the actual basis being invoked as authority for remand." *Id.*[9]

The Second Circuit's decision in *Carvel v. Thomas and Agnes Carvel Foundation*, 188 F.3d 83 (2d Cir. 1999), is to the same effect. In that case, a foundation brought suit in state court against the trustee of a decedent's estate to enjoin the distribution of certain property of the estate. The trustee removed the case to federal court. In remanding the case to state court, the district court "explicitly stated that it lacked jurisdiction" to decide the claims concerning the estate property, *id.* at 85, and it concluded expressly that it "lacks subject matter jurisdiction over every claim for relief other than the claims for declaratory judgment." *In re Thomas and Agnes Carvel Foundation*, 36 F. Supp. 2d 144, 152 (S.D.N.Y. 1999). When the trustee sought review, the Second Circuit took jurisdiction, notwithstanding the district court's reliance on lack of subject matter jurisdiction. The Second Circuit observed that the district court had based its

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[9] *See also Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000) (reviewing and reversing district court's remand order despite district court's remand pursuant to § 1447(c) for lack of subject matter jurisdiction and despite the Fourth Circuit's concession that "if we are to accept [the district court's] conclusion, § 1447(d) would, at first blush, appear to bar us from reviewing the district court's order"), *cert. denied*, 121 S. Ct. 759 (2001).

opinion on *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), which the court of appeals viewed as an abstention case. 188 F.3d at 85-86. The Second Circuit thus decided that, notwithstanding the district court's characterization of its own order, the remand was actually based on abstention, not jurisdiction, and thus was reviewable. *Id.* at 86.

Numerous other circuits have adopted the same approach. The Tenth Circuit, for example, citing liberally from the majority opinion in *Mangold*, *see supra*, has held that "[m]ere mention of § 1447(c) or the 'magic words' of subject matter jurisdiction, however, do not automatically render a remand order nonreviewable under § 1447(d)." *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997); *see also Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998) ("An explicit reference to § 1447(d) does not automatically render a remand order nonreviewable . . . . In order to evaluate the reviewability of the district court's remand orders, we must independently review the record to determine the actual grounds upon which the district court believed it was empowered to remand."); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) ("A district court's assertion that it lacks jurisdiction, and even explicit references to § 1447(c), does not automatically render a remand order nonreviewable under § 1447(d)."). And, in *In re TMI*, 940 F.2d 832 (3d Cir. 1991), the Third Circuit reviewed a remand order even though the district court had declared the underlying jurisdictional statute unconstitutional and then remanded for lack of subject matter jurisdiction pursuant to § 1447(c). 940 F.2d at 848.

The Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit have similarly rejected a magic words approach. *See,*

e.g., *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993) ("[l]ooking behind the face of the order" to determine the basis of the remand); *see also id.* at 1350-51 (Celebrezze, J., dissenting) ("The mere incantation of the mantra '§ 1447' should not be enough to preclude review if it appears to this court that this is not a § 1447 order. I do not believe the majority would disagree. Hence, this court must attempt to determine the justifications supporting the order to determine if they are consistent with a § 1447 order."); *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291, 1294 (9th Cir. 1987) (looking past the district court's explicit citation to 1447(c) and analyzing the hearing transcripts and "[c]onsidering the entire record" before dismissing the appeal); *Poore v. American-Amicable Life Insurance Co. of Texas*, 218 F.3d 1287, 1291-92 (11th Cir. 2000) (reviewing remand order even though the order was based on the district court's determination that "it lacked diversity jurisdiction because the amount in controversy did not meet the jurisdictional minimum set forth in 28 U.S.C. § 1332").

Leading treatises confirm that the Fifth Circuit's approach is out of step with the more flexible approach adopted by the other circuits. Professors Wright, Miller, and Cooper have noted, for example, that "[a]ppellate courts frequently look beyond the district court's citation . . . to Section 1447(c); instead, they engage in independent review of the actual grounds upon which the district court justified its decision to remand." 14C Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3740, at 533-40 (3d ed. 1998). And Professor Moore has noted that the "Fifth Circuit has taken a strict approach" to the review of remand orders. 16 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 107.44[2][c], at 107-227 (3d ed. 2000); *see also id.* at 107-

227 n.41.1 (citing *Smith v. Texas Children's Hospital*, 172 F.3d 923 (5th Cir. 1999), for the proposition that the "Fifth Circuit will not look beyond language of the remand order to surrounding circumstances to determine whether remand was based on substantive decision on merits").

In short, the Fifth Circuit's reliance on magic words as conclusive in determining the reviewability of remand orders is in direct conflict with the approach adopted by seven other Circuits, and cannot be reconciled with *Thermtron* and its progeny. Review by this Court is thus appropriate and necessary.

B. The Fifth Circuit's Refusal to Review a Remand Order Issued after the District Court Exercised Subject Matter Jurisdiction over the Case Conflicts with Numerous Decisions of Other Courts of Appeals.

The Fifth Circuit's application of the magic words doctrine in this case was critical because an independent review of the district court's actions compels the conclusion that the order was reviewable.

Once the district court by word or action acknowledges jurisdiction, a subsequent remand for lack of subject matter jurisdiction – based for example on the amendment of the complaint or the addition or deletion of a party – is reviewable. *See, e.g., In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 709 (7th Cir. 1992); *see also Baldridge*, 983 F.2d at 1348 (explaining that if a district court "thought that the removal had been jurisdictionally proper but that jurisdiction had 'vanished' when [a party] dropped out, the remand – even though based on a finding of lack of

jurisdiction – would be reviewable."); *Survival Systems of the Whittaker Corp. v. United States District Court for the Southern District of California*, 825 F.2d 1416, 1418 (9th Cir. 1987) ("[R]emand could not possibly have been based on section 1447(c); removal had not been 'without jurisdiction,' since five of [plaintiff's] claims were held to be preempted by federal law. The statutory preclusion of review under section 1447(d) is therefore not applicable."); *Poore*, 218 F.3d at 1291-92 (remand order was reviewable because district court premised its conclusion that it lacked subject matter jurisdiction on a damages limitation contained only in the amended complaint).[10] Such a remand is necessarily a reviewable "*Cohill* remand" – now a remand pursuant to 28 U.S.C. § 1367(c)(3)[11] – in which the district court utilizes its discretion to dismiss state claims after federal claims asserted in the complaint have been dismissed.

In this case, after plaintiff voluntarily amended her complaint to add a federal TILA claim, the district court dismissed that claim with prejudice. As the Fifth Circuit acknowledged, a dismissal with prejudice could only have been entered if the district court had subject matter jurisdiction over the amended complaint. Pet. App. 11a-12a. Thus, the only reasonable way to square the district court's dismissal of the TILA claim with the remand for lack of

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[10] The Fifth Circuit is the lone Circuit to hold to the contrary. *See Linton v. Airbus Industrie*, 30 F.3d 592, 599 (5th Cir. 1994) (remand for lack of subject matter jurisdiction not reviewable even if district court thought it had jurisdiction at the time of removal and then remanded only after a subsequent event caused jurisdiction to be "lost").

[11] Section 1367(c)(3) provides, in part, that a district court "may decline to exercise supplemental jurisdiction over a claim if . . . the district court has dismissed all claims over which it has original jurisdiction."

subject matter jurisdiction is to hold that the district court thought it had subject matter jurisdiction as a result of the federal TILA claim, and thought it lost that jurisdiction because the TILA claim was dismissed.

As other courts of appeals have made clear, remands in such cases are reviewable. Judge Easterbrook's unanimous opinion in *In re Amoco* is directly on point. In that case, an employment dispute alleging state law claims was removed to federal court on the theory that the suit required interpretation of a collective bargaining agreement and thus was within federal law. Without explanation, the district court initially denied a motion to remand but then, after the employee's union dropped out as co-plaintiff, granted a motion to reconsider and remanded for lack of subject matter jurisdiction. The Seventh Circuit held the remand order reviewable, noting that "[t]he only way to make the orders consistent is to assume that the judge believed that so long as the union was a plaintiff, there was federal-question jurisdiction, which vanished when the union dropped out. If that was indeed the court's approach, then we may review the order by mandamus." 964 F.2d at 709; *see also Engelhardt v. Paul Revere Life Insurance Co.*, 139 F.3d 1346, 1350-51 (11th Cir. 1998) (because "[t]he district court demonstrated its belief that it had original subject matter jurisdiction over the ERISA claim by expressly retaining jurisdiction over the issue of statutory attorney's fees and interest," the court's "subsequent remand of the related state law claim was necessarily a decision not to exercise supplemental jurisdiction under § 1367(c)(3)"); *Executive Software North America, Inc. v. United States District Court for the Central District of California*, 24 F.3d 1545, 1549 (9th Cir. 1994) ("[W]e have held that asserting original jurisdiction over at least one of the claims removes the possibility that a remand

order is issued pursuant to section 1447(c). Accordingly, the remand order in this case is reviewable.") (internal citation and quotation omitted); *Survival Systems*, 825 F.2d at 1418 (holding that a remand order was reviewable because "remand could not possibly have been based on section 1447(c) . . . since five of [plaintiff's] claims were held to be preempted by federal law").

The Fifth Circuit's reliance on the magic words doctrine to deny review despite the district court's dismissal of the TILA claim with prejudice is flatly inconsistent with these cases. Because access to federal courts should not turn on the fortuity of geography, this Court should grant the petition in this case.

C. The Fifth Circuit's Approach Conflicts with Numerous Decisions of this Court and the Courts of Appeals Holding in Analogous Contexts that a District Court's Characterization of its Own Actions Is Not Conclusive of the Reviewability of Those Actions.

The Fifth Circuit's approach also conflicts with abundant precedent from this Court and the courts of appeals in analogous contexts that "[t]he label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue," and that the appellate court must "determin[e] the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *United States v. Sisson*, 399 U.S. 267, 279 n.7 (1970) (internal quotation omitted) (alteration in *Sisson*).

In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), respondent asked this Court to dismiss an appeal filed by the Secretary of Health and Human Services on the ground that there was no "final judgment." This Court denied respondent's request, despite the fact that "the District Court did not caption its order as a 'judgment,' much less a 'final judgment.'" *Id.* at 628 n.7. The Court stated unequivocally that "[t]he label used by the District Court of course cannot control the order's appealability in this case." *Id.*

Similarly, in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), the court of appeals had taken jurisdiction over an appeal, reasoning that because the district court had "made the recital required by Fed. R. Civ. Proc. 54(b) that final judgment be entered on the issue of liability, and that there was no just reason for delay, the orders thereby became appealable as a final decision pursuant to 28 U.S.C. § 1291." *Id.* at 742. This Court disagreed, holding that the district court's recitation was not conclusive of appealability: "[D]espite the fact that the District Court undoubtedly made the findings required under the Rule had it been applicable, those findings do not in a case such as this make the order appealable pursuant to 28 U.S.C. § 1291." *Id.* at 742-43.

In *Sampson v. Murray*, 415 U.S. 61 (1974), the district court issued orders preventing discharge of a probationary employee pending review of her termination. Although the district court labeled its order as a temporary restraining order ("TRO"), *see* 415 U.S. at 67 n.8, which would normally be unreviewable, this Court held that the order was reviewable because the order was, in the Court's judgment, actually a preliminary injunction. *Id.* at 87-88. *See also Carson v. American Brands*, 450 U.S. 79 (1981) (holding that this Court has jurisdiction to review a district court's

refusal to accept a consent decree that would have imposed affirmative obligations on employer because that refusal was effectively a denial of an injunction reviewable under § 1292(a)(1)).

The courts of appeals have uniformly followed suit. For example, in *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814 (1st Cir. 1982), the court of appeals took jurisdiction of an appeal despite the district court's characterization of its order as a TRO. Writing for a unanimous panel, then-judge Breyer stated that "the use of the 'temporary restraining order' label by a district court does not defeat appealability if the order is in substance a preliminary injunction." *Id.* at 816; *see also In re Slimick*, 928 F.2d 304, 308 (9th Cir. 1990) ("It is irrelevant that the court designated the first disposition an order and the later disposition a judgment. Appealability turns on the effect of the ruling, not the label assigned to it by the trial court."); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1199 n.4 (9th Cir. 1975) (reviewing "discovery order" and noting that "appealability turns not on labels but on the substantial impact of the order"); *Spates v. Manson*, 619 F.2d 204, 209 n.3 (2d Cir. 1980) (Friendly, J.) ("It is clear that nothing turns on the use of the word 'judgment' or the statement that 'summary judgment be and is hereby entered in favor of the Plaintiffs in accordance with the Court's Memoranda of Decision.' . . . Appealability turns on what has been ordered, not on how it has been described.").

The Fifth Circuit's refusal to look beyond the district court's characterization of its own order cannot be reconciled with this unbroken line of cases and thus merits this Court's review.

D. The Fifth Circuit's Magic Words Approach Cannot Be Justified By Precedent or Policy.

In the face of the uniformity among the cases of this Court and the courts of appeals, the Fifth Circuit's magic words approach cannot be sustained. As members of this Court have observed, "it make[s] little sense to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." *Things Remembered, Inc.*, 516 U.S. at 134 (Ginsburg, J., concurring) (internal quotation and citation omitted). Such an approach facilitates manipulation by the parties and the district courts and, at the very least, creates the perception of unfairness and abuse. As the Court noted in *Sampson v. Murray*, "[a] district court, if it were able to shield its order from appellate review merely by [its] designati[on]" would have "virtually unlimited authority over the parties." 415 U.S. at 86-87. *Cf. Thermtron*, 423 U.S. at 351 (Congress did not "intend[] to extend carte blanche authority to the district courts to revise the federal statutes governing removal").

The Fifth Circuit was unconvinced that its decision would engender these severe consequences, noting that it "seriously doubt[ed]" that federal courts would abuse the power to render their orders unreviewable. Petitioners need not take issue with the court's analysis, *cf. Sykes v. Texas Air Corp.*, 834 F.2d 488, 492 n.15 (5th Cir. 1987) ("[w]e do not mean to suggest that federal district courts are prone to manipulate legal doctrine"), to note that it is beside the point. The key question is "whether rules of appellate jurisdiction that give incentives for manipulation are wise." *Id.* In determining the scope of appellate jurisdiction, this Court has consistently recognized that giving conclusive effect to a district court's label is profoundly unwise. The Fifth

Circuit's contrary conclusion in the context of § 1447(d) cannot stand.

None of the other justifications offered by the Fifth Circuit remotely justifies the magic words approach. The Fifth Circuit sought, for example, to sidestep the serious consequences of its approach by stating that "Congress struck the balance of competing interests in favor of judicial economy." Pet. App. 11a (internal citation and quotation omitted). The Fifth Circuit's assessment of the congressional interests is, however, incomplete at best. As this Court made clear in *Cohill*, although Congress intended to preclude review of remands issued pursuant to § 1447(c), Congress intended to permit review of discretionary (*i.e.*, non-Section 1447(c)) remands, notwithstanding any concerns over judicial economy.[12] Indeed, review of discretionary remands is critical to judicial economy, because it ensures that district courts, before exercising their discretion to remand state claims once the original basis of federal jurisdiction has been eliminated, have properly considered the effect of proceedings already conducted by the federal court. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 173 (1997) (holding that § 1367(c) "reflects the understanding" that a district court deciding whether to exercise supplemental jurisdiction must consider, among other things, "judicial economy"); *see also Cohill*, 484 U.S.

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[12] The courts of appeals have unanimously held that discretionary remands – whether pursuant to 28 U.S.C. § 1367(c)(3) or (prior to the enactment of that statute) pursuant to *Cohill* – are reviewable. *See, e.g., In re U. S. Healthcare, Inc.*, 193 F.3d 151, 159 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 2687 (2000); *Engelhardt*, 139 F.3d at 1350-51; *St. John v. International Association of Machinists and Aerospace Workers*, 139 F.3d 1214, 1216-17 (8th Cir. 1998); *see also Things Remembered, Inc.*, 516 U.S. at 130 (Kennedy, J., concurring) (citing cases).

at 350 n.7 (citing "judicial economy" as one of the factors to be considered in deciding whether to remand state claims following the dismissal of all federal claims). Allowing a discretionary remand order to evade the appellate review mandated by the Supreme Court and Congress when the face of the order makes clear that the district court mischaracterized the basis for remand flouts, rather than furthers, congressional intent.

Moreover, the Fifth Circuit's opinion is itself antithetical to considerations of judicial economy, as even the Fifth Circuit realized. *See* Pet. App. 12a n.6. The Fifth Circuit's application of the magic words doctrine forced the court to hold that the district court's dismissal of the TILA claims was null and void and that Monogram could again remove the case to federal court. *Id.* The Fifth Circuit thus permitted remand while concluding expressly that the case was immediately removable. That approach not only is illogical (thus demonstrating the flaws in the magic words approach), it triggered an entirely unnecessary set of filings and briefings.

Even worse, the Fifth Circuit's approach triggered an unseemly race to the courthouse. Relying on the Fifth Circuit's assurance that Monogram may "file another petition based on the TILA claim once this claim is returned to state court," *id.*, Monogram filed a second removal motion on the morning after the Fifth Circuit's opinion was issued, only to learn shortly thereafter that plaintiff had obtained an *ex parte* order from the state court dismissing the TILA claim the day before (*i.e.*, on the day the Fifth Circuit's opinion was issued). That dismissal caused the district court to grant plaintiff's subsequent motion to remand. Thus, notwithstanding the Fifth Circuit's expectation that

Monogram would ultimately have its claims resolved in federal court, Monogram has once again had its case remanded as part of plaintiff's continuing effort to deprive Monogram of its statutory right to a federal forum. Congress could not have intended the resolution of critical questions of federal law to depend on who wins the post-appeal race to the courthouse. *See, e.g., Mobil Oil Exploration Co. v. FERC*, 814 F.2d 998, 1000 (5th Cir. 1987) (per curiam) ("Such races-to-the-courthouse distort the true intendment of the statutory scheme.").

Equally unpersuasive is the Fifth Circuit's attempt to justify its result based on the statement in *Thermtron* that only remand orders "issued under § 1447(c) and invoking the grounds specified therein" are insulated from review. Pet. App. 4a (internal citation and quotation omitted). That language only poses, rather than answers, the question presented in this petition, namely, how should a court of appeals determine when an order is "issued under § 1447(c)." As all of the other courts of appeals faced with the issue have concluded, the proper way to make that determination is not to rely on magic words used by the district court, but instead independently to review the record to determine the actual grounds of the district court's decision. *See also supra*, at 13 (showing that the logic of *Thermtron* precludes reliance on "magic words").

In sum, the Fifth Circuit's opinion creates a regime in which a remand order that Congress made reviewable is rendered non-reviewable simply because the district court – wittingly or unwittingly – intoned the magic words of § 1447(c). That regime, is inconsistent with precedent, congressional intent, and common sense, and thus merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

Appendix A

United States Court of Appeals,
Fifth Circuit.

Patricia HEATON, Plaintiff-Appellee,
v.
MONOGRAM CREDIT CARD BANK OF GEORGIA,
Defendant-Appellant.

No. 99-31341.

Nov. 2, 2000.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DUHE, EMILIO M. GARZA and DeMOSS, Circuit Judges.

DUHE, Circuit Judge:

Monogram Credit Card Bank of Georgia ("Monogram") appeals the district court's order remanding this case to state court pursuant to 28 U.S.C. § 1447(c). Because Congress has specifically excluded this type of remand order from appellate review, we conclude that we lack jurisdiction and therefore DISMISS Monogram's appeal.

BACKGROUND

We summarize only the facts relevant to the issues in dispute in this appeal. Monogram, a Georgia credit card bank, issued a credit card to Patricia Heaton ("Heaton") to finance purchases from a retail store called Campo Appliances. Heaton brought a class action lawsuit in state

court, alleging that Monogram charged late fees on the card in excess of the limit provided under the Louisiana Consumer Credit Law ("LCCL"), La. R.S. 9:3527. Heaton also alleged breach of contract.

Monogram removed the suit. It argued that there was a basis for federal subject matter jurisdiction because Heaton's claims were completely preempted by Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d. Section 27 of the FDIA authorizes federally-insured "state banks" (as defined under Section 3(a)(2) of the FDIA, 12 U.S.C. § 1813(a)(2)) to charge late fees permitted by the laws of their home states. Georgia law provides for a higher late fee limit than the LCCL. Monogram also argued that the parties were diverse and, pursuant to *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995), Heaton's demand for attorney's fees under the LCCL caused the amount in controversy to exceed $75,000.

Heaton sought remand, arguing that Monogram could not invoke complete preemption because it was not a "state bank" under the definition contained in Section 3(a)(2) of the FDIA. Section 3(a)(2) defines state banks as those which are "engaged in the business of receiving deposits" and which are incorporated under state law. Part of Heaton's argument was that because Monogram accepts deposits only from its parent company and not from its customers, it could not be engaged in the business of receiving deposits. She also contended that *In re Abbott Laboratories* was inapplicable, and therefore the court lacked diversity jurisdiction.

Judge Porteous denied Heaton's motion, concluding that under the plain language of the FDIA, Monogram was a "state bank." He also cited a letter from the Federal Deposit

Insurance Corporation ("FDIC") in which the FDIC stated that it considered Monogram to be a state bank. Therefore, Heaton's claims were completely preempted.[1] Less than a week after the denial of remand, the case was re-assigned to Judge Barbier. Judge Barbier denied Heaton's petition for an interlocutory appeal of the denial of remand, finding that there was no "substantial ground for difference of opinion as to whether the defendant is a state bank." *Heaton v. Monogram Credit Card Bank of Georgia*, No. 98-1823 (E.D. La. Nov. 25, 1998) (minute entry denying permission to appeal).

Thereafter, Heaton moved to amend her petition to assert a federal claim under the Truth in Lending Act ("TILA"), specifically 15 U.S.C. § 1637(c)(3)(B). This claim was not related to the credit card late fees. A magistrate judge denied this motion, but Judge Barbier vacated the magistrate judge's order and allowed Heaton to assert the TILA claim.

Later, Heaton discovered that Monogram had participated in the preparation of the FDIC letter that Judge Porteous had cited in his order denying the motion to remand. Heaton then moved for a reconsideration of her motion. Judge Barbier granted the motion and remanded the case to state court, citing 28 U.S.C. § 1447(c). The judge rejected Monogram's argument that Heaton had waived her objection to the earlier denial of remand by amending her petition to add the TILA claim. On the same day that he signed the remand order, Judge Barbier granted Heaton's voluntary motion to dismiss

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[1] The judge's order did not address the question of diversity jurisdiction.

that claim with prejudice, and noted the dismissal in a footnote in the remand order.

In granting the motion to remand, Judge Barbier concluded that Monogram was not a "state bank" because it was not "engaged in the business of receiving deposits" under Section 3(a)(2). He reasoned that because Monogram only receives deposits from its parent company, under a plain reading of the FDIA, it could not be engaged in the business of receiving deposits from its customers. As a result, the judge concluded that "this Court does not have federal question jurisdiction, and there is no federal preemption." *Heaton v. Monogram Credit Card Bank of Georgia*, No. 98-1823 (E.D. La. Nov. 22, 1999) (minute entry ordering remand). The judge also found diversity lacking, and noted that "if there is any doubt as to federal subject matter jurisdiction, the court should resolve the doubt in favor of remand." *Id.*

Monogram appealed. Heaton moved to dismiss the appeal for lack of appellate jurisdiction.

DISCUSSION

We begin with 28 U.S.C. § 1447(d), which provides: "An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise." Notwithstanding this broad language, the Supreme Court has explained that this provision is to be interpreted *in pari materia* with § 1447(c), such that only remand orders issued under § 1447(c) and "invoking the grounds specified therein" are immune from review. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46, 96 S. Ct. 584, 590, 46 L. Ed. 2d 542 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct.

1712, 135 L. Ed. 2d 1 (1996); *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 925 (5th Cir. 1999). Lack of subject matter jurisdiction is one basis for remand under § 1447(c). A § 1447(c) remand is not reviewable on appeal even if the district court's remand order was erroneous. *Thermtron*, 423 U.S. at 343, 96 S. Ct. at 589; *Smith*, 172 F.3d at 925; *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). "Reviewable non-§ 1447(c) remands constitute a narrow class of cases, meaning we will review a remand order only if the district court 'clearly and affirmatively' relies on a non-§ 1447(c) basis." *Copling v. Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999); *Giles*, 172 F.3d at 336. The justification for this rule is "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron*, 423 U.S. at 351, 96 S. Ct. at 593. As a result, we have stated that "the district court is the final arbiter of whether it has jurisdiction to hear the case." *Smith*, 172 F.3d at 925.

A plain and common sense reading of the Judge Barbier's remand order reveals that he stated a § 1447(c) basis for remand. The judge specifically concluded that "this Court does not have federal question jurisdiction" and that "there is no federal preemption." He also specifically mentioned that doubt as to whether there is subject matter jurisdiction should be resolved in favor of remand. He then invoked § 1447(c) in ordering the remand. Even if Judge Barbier's conclusions that Monogram was not a state bank and that there was therefore no preemption were erroneous, we cannot review his remand order.

Monogram argues, however, that despite the clear language of the remand order, the true basis for the order was 28 U.S.C. § 1367(c)(3). Monogram thus concludes that we

have jurisdiction in this case because remand orders pursuant to § 1367(c) are subject to appellate review. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). Under § 1367(c)(3), a district court may decline in its discretion to exercise supplemental jurisdiction over supplemental (formerly "pendent") state law claims when the court has dismissed all claims giving rise to original jurisdiction. Monogram asserts that Judge Barbier's dismissal of Heaton's federal TILA claim, which he noted in his remand order, was the predicate for the remand of what Judge Barbier considered to be remaining state law claims. Heaton's addition of the TILA claim, according to Monogram, formed an independent basis for federal question jurisdiction, and Judge Barbier's dismissal of the claim *with* prejudice demonstrated that he thought he had subject matter jurisdiction over that claim. Therefore, Monogram argues that the remand order was necessarily pursuant to § 1367(c)(3), and Judge Barbier simply mislabeled the order as one pursuant to § 1447(c).

In making this argument, Monogram relies on our decision in *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994). In that case, a panel of this Court stated:

> The critical distinction for determining appealability is the presence of federal subject matter jurisdiction prior to the order of remand. In a Section 1447(c) remand, federal jurisdiction never existed, and in a non-Section 1447(c) remand, federal jurisdiction did exist at some point in the litigation, but the federal claims were either settled or dismissed.

Id. at 762. Monogram asserts that because the TILA claim conferred federal question jurisdiction on the district court, federal jurisdiction "did exist at some point" in the suit and therefore the remand could not have been based on § 1447(c).

We reject Monogram's argument. In *Bogle*, the district court's remand order concluded that "'[t]his case does not contain a federal claim.'" *Id.* However, the court also went on to discuss the discretionary factors set forth in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988), which district courts should consider in remanding supplemental state law claims. Therefore, because the remand order in *Bogle* was at first glance somewhat ambiguous, our elucidation of the grounds for remand was required in order to determine the district court's reasons for remanding. We concluded that the district court's discussion of the discretionary factors did not taint its conclusion that subject matter jurisdiction was lacking, and therefore § 1447(c) formed the basis for the order. *Bogle*, 24 F.3d at 762.

In the instant case, however, we see no ambiguity whatsoever in Judge Barbier's remand order. Although brief, the order clearly and affirmatively stated a § 1447(c) reason for remand, because Judge Barbier concluded that he lacked subject matter jurisdiction. His citation of § 1447(c) is clearly not a "mislabeling" of the basis for remand. Nowhere in the order did the judge discuss the discretionary factors set forth in Carnegie-Mellon, nor did he cite § 1367(c)(3) or any other basis for remand.[2] In *Smith*, this Court initially reviewed the first of two remand orders in that case. Because

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[2] *But see Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999) (where the remand order was reviewable on appeal because "[t]he court specifically noted that 'this is an appealable order because the basis of my ruling is an exercise of discretion to remand pendent state law claims.'"); and *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994) (the remand order was reviewable because "[t]he district court below made clear that it was remanding Hook's state law negligence claim, i.e., her only remaining claim, pursuant to its discretion.").

the district judge granted summary judgment against the plaintiff on some of her claims but remanded a remaining state law claim, the Court interpreted the order as a discretionary remand of pendent state law claims. *Smith v. Texas Children's Hosp.*, 84 F.3d 152, 154 (5th Cir. 1996). On remand to the federal district court, the district judge entered a second order remanding the case to state court. Despite our interpretation of the first remand order, the second remand order stated: "This court does not and has never had jurisdiction over Smith's claim." The judge then ordered the remand pursuant to § 1447(c). *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 925 (5th Cir. 1999). On the appeal of this second order, we concluded that the order did not affirmatively state a non-§ 1447(c) ground for remand, and therefore § 1447(d) barred appellate review. *Id.* at 927. Likewise, in the instant case, even if Judge Barbier's conclusion that he lacked subject matter jurisdiction was clearly erroneous, he did not state a non-§ 1447(c) ground for remand and we cannot review his order.

Monogram relies on decisions of other circuits in asserting that the "mere incantation" of § 1447(c) or the words of subject matter jurisdiction does not automatically render the remand order unreviewable. Further, Monogram urges us to conduct an independent review of the remand order to determine the "true" basis for the remand. However, we note that in *Bogle*, looking at the face of the remand order we stated: "The magic words 'this case does not contain a federal claim' rendered the district court's remand order unreviewable." *Bogle*, 24 F.3d at 762.[3]

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[3] *See also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 n.1 (5th Cir. 1991) (noting that the grounds for reviewing remand orders have expanded, and admonishing district courts to

Monogram also argues that we must apply our decision in *In re Digicon Marine, Inc.*, 966 F.2d 158 (5th Cir. 1992), and conclude that we are not bound by Judge Barbier's "erroneous characterization" of his reasons for remanding. However, *Digicon Marine* supports, rather than contradicts, our holding today. In that case, the trial court granted a motion to remand based on the lack of authority to remove a maritime case under 28 U.S.C. § 1441(b). *Id.* at 159. Later, in an order denying reconsideration, it stated that the earlier ruling was based upon a lack of subject matter jurisdiction. *Id.* We concluded that "[d]espite the district court's description of the remand as one based on a lack of subject matter jurisdiction in its order on reconsideration, the district court's original remand order clearly indicates on its face that the remand was not based upon lack of original subject matter jurisdiction . . ." *Id.* at 160. In the instant case, Judge Barbier

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"take care to explain their reasons for remanding cases" because "the availability and means of appellate review turns exclusively on the district court's reason for remand."); *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir. 1991) ("Reviewability of a remand order depends entirely upon the trial court's stated grounds for its decision to remand."); *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211 & n.1 (5th Cir. 1987) (the remand order "is proof against review even if it merely 'purports' to remand on the ground quoted."); and *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 644 (5th Cir. 1978) ("If . . . the remand order states that it is based on 1447(c) statutory grounds, it is immune from review by an appellate court.").

Monogram suggests these decisions may be inapplicable because they dealt with cases originated before the December 1, 1990 effective date of § 1367. However, the Supreme Court clearly approved discretionary remands of pendent state law claims as early as 1988 in *Carnegie-Mellon*. Moreover, because of our holding today that Judge Barbier's order was based solely on § 1447(c) grounds, we see no reason why these cases are inapposite.

did not discuss his reasons for remanding in any order outside the remand order itself. Just as in Digicon Marine, in this case we need only look to the face of the remand order to determine his reasons for remanding. We cannot read the remand order to say that the court "clearly and affirmatively" relied on a non-§ 1447(c) basis as required by *Copling v. Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999) and *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). The face of the order clearly states a § 1447(c) basis for remand.[4]

We think adopting Monogram's position that we interpret the remand order as one pursuant to § 1367(c)(3) would basically require us to conclude that Judge Barbier remanded the case for the wrong reasons. That approach would essentially amount to an appellate review of the order, which Congress has clearly forbidden us to do under § 1447(d). Monogram urges that "[p]ublic policy considerations strongly militate in favor of allowing this appeal to be maintained." Appellant's Reply Brief at 10. It argues that allowing district courts to insulate their remand orders from appellate review by "intoning the words 'subject matter jurisdiction'" would unleash "unreviewable mischief" and deny litigants their right of appeal of § 1367(c)(3) remand orders. *Id.* Although we seriously doubt Monogram's prediction, we think the "public policy" decision is one for Congress to make, and one which it has already made in the plain language of § 1447(d). In

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[4] Moreover, we note that *Digicon Marine* points out that when a remand is reviewable on appeal, a district court may reconsider and vacate its own order. *Digicon Marine*, 966 F.2d 158, 160-61, quoting *In re Shell Oil Co.*, 932 F.2d 1523, 1528 (5th Cir. 1991). However, Monogram did not seek a reconsideration or amendment of Judge Barbier's order to reflect its position that the order was really based on § 1367(c)(3).

enacting § 1447(d), "Congress struck the balance of competing interests in favor of judicial economy." *Smith*, 172 F.3d at 925.[5]

We recognize that the merits of this case present significant questions of law concerning the interpretation of the FDIA and the ability of courts to "second-guess" the FDIC's determinations about whether financial institutions are "state banks" under the FDIA. However, we note that because we construe the remand order as jurisdictional in nature, the district court's determinations as to Monogram's substantive preemption defense will have no preclusive effect on the state court. *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999).

We think Judge Barbier clearly intended to base his order on § 1447(c). Having concluded that he lacked subject matter jurisdiction over the case, however, Judge Barbier lacked jurisdiction to grant Heaton's motion for voluntary dismissal with prejudice. Such a ruling is a judgment on the merits. *See Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir. 1980). In *Bogle*, the district court remanded the case because it believed that it lacked subject matter jurisdiction, yet it granted the plaintiff a partial nonsuit with prejudice of the claims that formed the basis of the defendant's removal petition. *Bogle v. Phillips Petroleum*

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[5] *See also Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1027 (5th Cir. 1998) ("[T]he [Supreme] Court has recognized that § 1447(d) intends to insulate from appellate review a district court's determinations as to its subject matter jurisdiction . . . ."); and *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1024 (5th Cir. 1991) ("The trial court brought its remand order within the absolute immunity from review of 28 U.S.C. § 1447(c) by expressly referring to a lack of jurisdiction as one of the bases of its decision to remand.").

Co., 24 F.3d 758, 762 (5th Cir. 1994). We held that order was void and of no effect. We reach the same conclusion here. The order dismissing Heaton's TILA claim is void.[6]

CONCLUSION

Because we have concluded that we lack jurisdiction in this case, we DISMISS Monogram's appeal pursuant to 28 U.S.C. § 1447(d).

APPEAL DISMISSED.

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[6] We realize that because of our holding today, Monogram may file another petition for removal based on the TILA claim once this case is returned to state court. We are aware that this result may conflict with the policy of judicial economy embodied in § 1447(d). However, we are constrained by the language of Judge Barbier's remand order that he felt he had no subject matter jurisdiction in this case, and therefore we can reach no other result but that Judge Barbier was not empowered to render a ruling on the merits.

Appendix B

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated	Civil Action No. 98-1823
v.	Section "T" (2)
MONOGRAM CREDIT CARD BANK OF GEORGIA	

Oct. 7, 1998.

ORDER AND REASONS

PORTEOUS, District J.

Before the Court is a motion by plaintiff Patricia Heaton to remand the above captioned case to the Civil District Court for the Parish of Orleans due to a lack of subject matter jurisdiction. After hearing oral arguments and reviewing the record and memoranda submitted by the plaintiffs and defendants, the court finds that it has subject matter jurisdiction.

BACKGROUND

In October 1995, plaintiff entered into a credit card contract with the defendant. Thereafter, defendant provided plaintiff with a "Campo" credit card, allowing her to shop at Campo

Appliances on credit. On May 11, 1998, plaintiff filed a class action suit in state court alleging that defendant improperly calculated and charged her "late fees" and alleging defendant violated the Louisiana Consumer Credit Law by charging her more than the statutorily allowed $15 late fee. On June 19, 1998, defendant timely removed this case to federal court alleging diversity jurisdiction and federal question jurisdiction.

LAW AND ANALYSIS

The standard regarding removal and remand is set forth in 28 U.S.C. § 1447(c) which states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Removal of cases initially filed in the state court is governed by 28 U.S.C. § 1441. Section 1441(a) permits removal of "any civil action brought in a state court of which the district courts of the United States have original jurisdiction." United States Courts have original jurisdiction of "all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. The jurisdictional framework governing the removal of federal question cases is centered on the well-pleaded complaint rule. It is long-settled law that a cause of action "arises under" federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *Gully v. First National Bank*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936).

A state-created cause of action may arise under federal law if the resolution of the dispute depends on the validity, construction or effect of federal law, so long as the federal question is a real and substantial issue. *Shultis v. McDougal*,

225 U.S. 561, 569, 32 S. Ct. 704, 56 L. Ed. 1205 (1912), and its resolution is an essential element of the plaintiff's case. *Gully*, 299 U.S. at 112.

The Federal Deposit Insurance Act (FDIA) is implicated in this case because the defendant is a state bank.[1] Title 12 U.S.C. § 1831d(a) states that, "[i]n order to prevent discrimination against State-chartered insured depository institutions, . . . if the applicable rate prescribed in this subsection exceeds the rate such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . take, receive, reserve and charge on any loan . . . or other evidence of debt, . . . at the rate allowed by the laws of the State . . . where bank is located." Defendant asserts that this provision of the FDIA completely preempts claims alleging that credit card late fees exceed the limit allowed by Louisiana's Consumer Credit Law, thus establishing federal question jurisdiction over plaintiff's claims.

The amount of interest Monogram charges its customers is, not only a "real and substantial issue" in this case, it is at the heart of the class action suit. And although plaintiff filed this suit under Louisiana law, federal law clearly is implicated in the claim. Given the plain language of the statute and considering the FDIC's position that Monogram is a "state bank" within the meaning of the statute, this Court finds that

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[1] Plaintiff argued that because defendant is a "credit card" bank under the laws of Georgia, it is not in the "business of receiving deposits" and is therefore not a "state bank." However, the Federal Deposit Insurance Corporation considers defendant a "state bank" under the provisions of Section 3(a)(2) of 12 U.S.C. 1813(a)(2). (Doc. 15. Ex. A.).

this claim arises under federal law and that the FDIA preempts the Louisiana Consumer Credit Law.[2]

As this Court finds federal question jurisdiction, it is unnecessary to address plaintiff's arguments regarding the applicability of attorneys fees to the named plaintiff in class action suits to the amount in controversy for diversity jurisdiction.

Accordingly,

IT IS ORDERED that the Plaintiff's Motion to Remand this case to the Civil District Court for the Parish of Orleans is hereby DENIED.

New Orleans, Louisiana, this
7th day October, 1998.

G. Thomas Porteous, Jr.
United States District Judge

[2] Plaintiff, in oral argument, agreed that such a finding would confer federal jurisdiction.

Appendix C

Minute Entry
Barbier, J.
November 25, 1998

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated — Civil Action No. 98-1823

versus

Section "J" (2)

MONOGRAM CREDIT CARD BANK OF GEORGIA

Before the court is plaintiff's "Motion to Amend Order to Include Statement Prescribed by 28 U.S.C. § 1292(B)" and "Petition for Permission to Appeal" which are set for hearing on November 25, 1998 at 9:30 a.m. on the briefs. Defendant opposes the motion and petition. For the following reasons, plaintiff's motion and petition are denied.

BACKGROUND AND FACTS

Plaintiff originally filed this class action suit in state court alleging, in part, violations by defendant of the Louisiana Consumer Credit Law due to excess late fee charges. Defendant removed the action to federal court and plaintiff attempted to have the case remanded to state court. In denying the remand motion, Judge Porteous concluded that

defendant was a state bank as defined by Section 3(a)(2) of 28 U.S.C. 1813(a)(2). As such, Judge Porteous found that plaintiff's claim arises under federal law and that the Federal Deposit Insurance Act, 12 U.S.C. § 1831(d), preempts the Louisiana Consumer Credit Law. Plaintiff now seeks to appeal this interlocutory order.

DISCUSSION

Title 28, § 1292(b) of the United States Code lists three criteria which must be met before entry of an interlocutory appeal is proper: 1) there must be a controlling question of law involved; 2) there must be substantial ground for difference of opinion on that question of law; and 3) an immediate appeal must materially advance the ultimate termination of the litigation. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981). Interlocutory appeals should be granted only in exceptional situations where allowing an appeal would avoid protracted and expensive litigation. *Clark-Dietz & Assoc. v. Basic Construction*, 702 F.2d 67 (5th Cir. 1983).

The court finds that an appeal is not proper in the present case for two reasons. First, plaintiff has not shown that an appeal will advance the ultimate termination of the litigation. Plaintiff simply points out that if the appellate court were to reverse this court, the case would be remanded. As pointed out by defendant, however, there is another basis for federal jurisdiction which was not resolved by this court which could be asserted after appeal. Additionally, remand does not amount to the termination of the litigation.

Further, the court concludes that plaintiff has not shown a substantial ground for difference of opinion as to whether

defendant is a state bank. Plaintiff cites no authority for the contention that defendant is not a state bank.

Accordingly,

IT IS ORDERED that plaintiff's "Motion to Amend Order to Include Statement Prescribed by 28 U.S.C. § 1292(b)" and "Petition for Permission for Appeal" are denied.

Appendix D

Minute Entry
Barbier, J.
November 22, 1999

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated — Civil Action No. 98-1823

versus

Section "J" (2)

MONOGRAM CREDIT CARD
BANK OF GEORGIA

Before the Court is plaintiff's Motion for Reconsideration (Rec. Doc. 78) of her Motion to Remand. Defendant opposes the motion. The motion, set for hearing on November 10, 1999, is before the Court on briefs and oral argument.

In the motion, plaintiff moves to reconsider the court's earlier denial of her motion to remand. Plaintiff primarily argues that defendant, Monogram Credit Card Bank of Georgia, is not a "state bank" as defined in the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1813(a)(2), and, therefore, federal question jurisdiction is not present and federal preemption does not apply.

Defendant argues that plaintiff has waived any objection to the earlier denial of the motion to remand, because she has

since voluntarily amended her Complaint to assert a federal question, namely, a claim under the Truth in Lending Act ("TILA").[1]

The Court, however, finds that no waiver has occurred in this particular case. The cases relied upon by defendant are distinguishable in that there had either been no objection to jurisdiction to begin with, *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200, 1202-03 (5th Cir. 1997), or there had been a judgment on the merits, *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 546 (5th Cir. 1990).

With respect to the merits of plaintiff's motion to remand, the Court must determine whether Monogram, a "credit card" bank chartered by the state of Georgia, is a "state bank" within the meaning of the FDIA. Under the statute, a "state bank" is defined as "any bank . . . which is engaged in the business of receiving deposits . . . , and is incorporated under the laws of any state . . . ." 12 U.S.C. § 1813(a)(2).

Because case law appears silent on this precise point,[2] the Court relies upon a reading of the plain language of the statute and concludes that, although Monogram receives "deposits" from its parent company, it is not engaged in the "business of receiving deposits" from its customers.

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[1] The Court notes that plaintiff has moved to voluntarily dismiss her TILA claims, which the Court has granted.

[2] Monogram relies on *Meriden Trust & Safe Deposit Co. v. Federal Deposit Ins. Corp.*, 62 F.3d 449 (2d Cir. 1995), as authority for its argument that it should be considered to be a "state bank" under the FDIA. However, that case is distinguishable because the bank in that case was originally chartered as a commercial bank, unlike Monogram which has never been anything but a credit card bank.

Accordingly, under the plain language of the statute, Monogram is not a "state bank." Therefore, this Court does not have federal question jurisdiction, and there is no federal preemption.

As for whether diversity jurisdiction is present, the Court notes that plaintiff seeks an award of attorney's fees not as a separate element of damages, but rather as class representative under La. C. Civ. P. Art. 595. This Court has previously considered this same question and has held that such attorney's fees should not be aggregated and attributed to the class representative for purposes of determining if the requisite jurisdictional amount exists for diversity jurisdiction. *See Jones v. The Valvoline Co.*, 98-557, 1999 WL 319215 (E.D. La. May 20, 1999).

The Court is also cognizant of the well recognized principle that, if there is any doubt as to federal subject matter jurisdiction, the court should resolve the doubt in favor of remand since it is presumed that a federal court lacks jurisdiction until it has been demonstrated to exist. *See, e.g., Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 792 (U.S.App.D.C.1983). Accordingly,

IT IS ORDERED that plaintiff's Motion for Reconsideration is GRANTED and the above captioned matter should be and is hereby REMANDED to Civil District Court for the Parish of Orleans, pursuant to 28 U.S.C. § 1447(c).

Appendix E

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated Plaintiff, v. MONOGRAM CREDIT CARD BANK OF GEORGIA Defendant.	Civil Action No. 98-1823 c/w 99-2603 Section "J" Magistrate 1

ORDER

Considering Plaintiff's Motion to Dismiss with Prejudice,

IT IS HEREBY ORDERED that Plaintiff's claim under the Truth in Lending Act is hereby dismissed with prejudice. All other claims asserted by Ms. Heaton, including those asserted under the Louisiana Consumer Credit Law, are hereby reserved.

New Orleans, Louisiana, this 22 day of November, 1999.

_____
JUDGE

Appendix F

United States Court of Appeals,
Fifth Circuit.

No. 99-31341

Jan. 5, 2001

Patricia HEATON, Plaintiff-Appellee,
v.
MONOGRAM CREDIT CARD BANK OF GEORGIA,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING EN BANC

(Opinion 11/2/00), 5th Cir., _____, _____ F.3d _____

Before Duhe, Emilio M. Garza and DeMoss, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing

is DENIED. The court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Chief Judge King and Judge Benavides did not participate in the consideration of the petition for rehearing en banc.

Appendix G

Statutory Provisions Involved

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over

such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Supreme Court, U.S.
FILED
MAY 18 2001
CLERK

No. 00-1505

In The

Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,

Petitioner,

v.

PATRICIA HEATON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Patricia Heaton, submits this brief in opposition to the petition for a writ of certiorari filed by Monogram Credit Card Bank of Georgia ("Petitioner" or "Monogram").

The Petition should be denied. The Fifth Circuit's ruling does not present the question raised by Petitioner. Monogram claims the Fifth Circuit refused to review the remand order simply because the trial court invoked 28 U.S.C. §1447(c). Petition at i. This is incorrect. Even a cursory review of the Fifth Circuit's decision reveals that the panel carefully scrutinized the entire remand order. After doing so, the Court of Appeals held that the remand was based on §1447(c) and not on §1367(c)(3) as Monogram had claimed. Thus, the Fifth Circuit did not rely on "magic words" in dismissing the appeal, and the ruling below is not worthy of a grant of certiorari.

The Petition should also be denied because Monogram has waived its right to seek review of the Fifth Circuit's decision. The day after the Court of Appeals issued the ruling Monogram removed the case to federal court for a *second* time. To establish federal question jurisdiction, Monogram relied on the federal claim the Fifth Circuit had reinstated in the decision. Monogram acquiesced in the judgment and did not suggest the ruling was in error or subject to further review.

Only now, after the district court has remanded the case a second time, does Monogram claim the Fifth Circuit erred and the Court should review the decision. Monogram, however, waived its right to seek relief in this Court by adopting the Fifth Circuit's ruling as its own.

Petitioner's conflicting, self-serving arguments are barred by the concept of judicial estoppel and must be rejected.

Monogram's petition, moreover, should be denied as moot. Monogram failed to advise the Court that the Federal Deposit Insurance Corporation ("FDIC") appealed the district court's second remand ruling to the Fifth Circuit. The appeal is pending. Thus, the issue now is whether the district court's second remand ruling was correct. Monogram's petition for a writ of certiorari, which is based on the first remand ruling, is moot.

Ultimately, certiorari should be denied because the Fifth Circuit's decision to dismiss the appeal under 28 U.S.C. §1447(d) is plainly correct. The ruling is consistent with *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and its progeny. The Court of Appeals properly rejected Monogram's transparent attempt to create appellate jurisdiction where none existed.

STATEMENT OF THE CASE

I. THE EVENTS LEADING UP TO THE FIRST REMAND RULING

A.

On May 11, 1998, Ms. Heaton filed this class action in state court on behalf of all Louisiana citizens who (like her) have been overcharged by Monogram in violation of the Louisiana Consumer Credit Law ("LCCL"). Monogram violated the LCCL by exceeding the limits placed on interest and late fees.

Ms. Heaton had entered into a private-label credit card contract with Monogram. Unlike a Visa or MasterCard, Ms. Heaton was provided with a credit card that only allowed her to shop at a local appliances store.

Monogram is not a bank in the ordinary sense of the word. Instead, it is a unique creature of Georgia law, a "credit card bank."

B.

Monogram removed the case to federal court, invoking diversity and federal question jurisdiction. Because Ms. Heaton had only alleged state-law claims, Monogram argued a federal question existed under the complete preemption doctrine. Specifically, Monogram alleged Ms. Heaton's claims were preempted by 12 U.S.C. §1831d(a).

Ms. Heaton moved to remand, arguing that federal question jurisdiction did not exist. The federal preemption statute could only be invoked by a "State bank," which is a bank incorporated under state law and engaged in the business of receiving deposits. *See* 12 U.S.C. §1813(a)(2).

Ms. Heaton argued Monogram was not a "State bank" because it was not engaged in the business of receiving deposits. As a Georgia credit card bank, Monogram could "only" engage in the business of credit cards. O.C.G.A. §7-5-3(6). The FDIC did not consider this issue when the agency approved Monogram for deposit insurance in 1988.

C.

Two days before oral argument on Ms. Heaton's remand motion, Monogram submitted a supplemental

brief. Attached was a letter signed by an FDIC employee and printed on FDIC letterhead (the "Letter"). In the Letter, the FDIC employee declared that Monogram was a "State bank." This, of course, was the core issue in the preemption analysis.

The district court denied the motion to remand, finding that federal question jurisdiction did exist under the complete preemption doctrine because Monogram was a "State bank." Pet. App. at 15a. The district court assumed the Letter was legitimate and substantially deferred to it in reaching this conclusion. *Id.* & n.1.

D.

Because the Letter was submitted at the last minute, Ms. Heaton did not have the opportunity to check its veracity. This was unfortunate because Ms. Heaton later discovered the Letter was Monogram's work product. The Letter had actually been ghost-written by John Douglas, a lawyer hired by Monogram who was the former general counsel of the FDIC.

Ms. Heaton sought to depose the FDIC employee who had signed the Letter. The FDIC, however, refused to make the employee available for deposition.

E.

Before discovering that the Letter was actually Monogram's work product, Ms. Heaton was granted leave to add a federal claim under the federal Truth in Lending Act ("the TILA claim"). At the time she had been duped into believing the Letter was legitimate and that federal question jurisdiction did exist.

F.

Because the Letter did not represent an impartial agency determination, Ms. Heaton moved for reconsideration of her motion to remand.[1] Ms. Heaton reiterated that Monogram could not be a "State bank" because Monogram was *prohibited* from engaging in the business of receiving deposits. O.C.G.A. §7-5-3(6). Moreover, the only deposits received by Monogram were from its parent company, GE, which were used to capitalize Monogram.

To further illustrate Monogram was not a State bank, Ms. Heaton noted that Monogram had less than one percent (.39%) of its money insured by the FDIC. Traditional banks, however, had approximately 76% of their deposits insured. Counsel for Monogram admitted at oral argument that the only reason Monogram obtained the de minimis amount of insurance was to attempt to qualify as a State bank and invoke the preemption statute. Resp. App. at 37.

At oral argument, the district court expressed its view that remand might be appropriate because Monogram may not qualify as a "State bank."

To prevent a remand, Monogram again turned to its friends at the FDIC for help. Thus, shortly after oral argument the FDIC filed a motion to intervene as a party in the case. If granted, the FDIC would argue federal question jurisdiction existed under 12 U.S.C. §1819(b)(2)(A) thereby preventing a remand. Ironically,

---

[1] In her briefs, Ms. Heaton indicated she would dismiss the federal claim and later did so. Monogram incorrectly suggests that Judge Barbier raised this issue sua sponte. Petition at 6.

the FDIC was aware of the case for over a year before seeking to intervene.

II. THE CASE IS REMANDED.

The district court granted reconsideration and remanded the case due to a lack of subject matter jurisdiction. Pet. App. at 20a. The trial court rejected Monogram's claim that Ms. Heaton had waived her jurisdictional objections by adding a federal claim after removal. *Id.* at 21a. Because no waiver had occurred, the district court noted its dismissal of the federal claim in a footnote. *Id.* at n.1.[2]

The trial judge then turned to the issue of federal question jurisdiction. The court found it lacked such jurisdiction because Monogram did not qualify as a "State bank" and, therefore, could not invoke the federal preemption statute. *Id.* at 21a-22a. Similarly, the judge found he lacked diversity jurisdiction. *Id.* at 22a.

The district court, therefore, specifically cited 28 U.S.C. §1447(c) and remanded the case. *Id.* The court recognized that if federal jurisdiction was in doubt, remand was appropriate. *Id.*[3]

III. MONOGRAM APPEALS THE REMAND RULING.

A.

Acutely aware of §1447(d) and its prohibition on appealing remand orders, Monogram knew its appeal

---

[2] Ms. Heaton had previously moved to dismiss the claim with prejudice.

[3] Because the court lacked subject matter jurisdiction, the FDIC's motion to intervene was subsequently denied as moot.

had to squeeze into the *Thermtron* exception. As a result, Monogram argued in the Notice of Appeal the district court "erroneously cited" §1447(c) and actually remanded the case in its discretion under 28 U.S.C. §1367(c)(3). Resp. App. at 1-2. Under *Thermtron*, a remand under §1367(c)(3) would have been appealable.

To establish that a §1367(c)(3) remand had occurred, Monogram invoked *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994) and argued that the trial court's dismissal of the federal claim proved federal jurisdiction had existed. Therefore, the remand of the remaining state-law claims must have been in the district court's discretion under §1367(c)(3).

Notably, Monogram had *not* asked the district court to reconsider its invocation of §1447(c) before raising the issue on appeal. Similarly, Monogram did not request the trial judge to clarify whether he remanded the case under §1367(c)(3) or §1447(c).

B.

Ms. Heaton moved to dismiss the appeal under §1447(d) for lack of appellate jurisdiction. The district court obviously had not remanded the case under §1367(c)(3). The judge's entire analysis was focused on whether he enjoyed subject matter jurisdiction. *See* Pet. App. at 20a-22a. The district court, moreover, did not cite §1367(c)(3), nor did it rely on any of the factors articulated by this Court in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) in deciding a discretionary remand. Even if the trial court erred in remanding under §1447(c), the order was still unappealable. *See Thermtron*, 423 U.S. at 351.

Monogram responded that the Fifth Circuit should review the remand ruling and determine the statutory basis on which the remand was based. Monogram argued the Court of Appeals did "not need to look beyond the face of the remand order here to determine that, in reality, it is necessarily based on Section 1367(c)(3), and therefore appealable." Monogram's Opposition to Motion to Dismiss at 8.

IV. THE FIFTH CIRCUIT DECISION

A.

On November 2, 2000, the Fifth Circuit dismissed Monogram's appeal under §1447(d). Pet. App. at 1a-12a. The Fifth Circuit did exactly what Monogram requested. The panel thoroughly scrutinized the remand order to determine for itself whether the remand was based on a §1447(c) ground.

The Fifth Circuit found that a "plain and common sense reading of . . . Judge Barbier's remand order reveals that he stated a §1447(c) basis for remand." Pet. App. at 5a. For example, the trial judge expressly held that he did "not have federal question jurisdiction and that there is no federal preemption." *Id.* (quotations omitted) Similarly, the district court had "invoked §1447(c) in ordering the remand." *Id.*

B.

The appellate court did not stop its analysis of the remand ruling at this point. Instead, the Fifth Circuit went on to reject Monogram's invocation of *Bogle* and the argument that the trial court must have exercised jurisdiction in dismissing the federal claim. *Bogle* was distinguishable because that case involved an ambiguous

remand ruling in which the trial court remanded for lack of jurisdiction, but also discussed the *Carnegie-Mellon* factors in deciding a discretionary remand. Pet. App. at 7a.

Here, however, the Fifth Circuit found "no ambiguity whatsoever in Judge Barbier's remand order." *Id.* The trial judge "clearly intended to base his order on §1447(c)." *Id.* at 11a. Moreover, the district court did not cite §1367(c)(3) or the *Carnegie-Mellon* factors. *Id.* at 7a.

As a result, the district court erred in dismissing the federal claim with prejudice because the court found it lacked subject matter jurisdiction. Therefore, the Fifth Circuit reinstated the federal claim, holding that the dismissal order was void and of no effect. *Id.* at 11a-12a.

V. MONOGRAM RELIES ON THE FIFTH CIRCUIT DECISION AND RE-REMOVES THE CASE.

A.

Monogram removed the case to federal court for the second time the morning after the Fifth Circuit rendered its decision. To invoke federal question jurisdiction, Monogram relied on the federal claim that had been revived by the Court of Appeals. Resp. App. at 7 & 9.[4] Nowhere in the Notice of Removal did Monogram claim the Fifth Circuit's decision was in error or subject to further review. *Id.*

Ms. Heaton moved to remand the case for lack of subject matter jurisdiction. Ms. Heaton had dismissed the federal claim in state court the day before Monogram re-removed the case as authorized by Louisiana Code of Civil Procedure article 1671.

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[4] Monogram also removed the case on the same grounds it had alleged in the first removal: namely, complete preemption by 12 U.S.C. 1831d(a) and diversity jurisdiction.

B.

Realizing the district court would remand the case a second time, Monogram again turned to the FDIC for help. The agency, consequently, filed another motion to intervene as a party, hoping to invoke 12 U.S.C. §1819(b)(2)(A) and create federal question jurisdiction. Monogram and the FDIC had tried this tactic in 1999 in connection with the first remand proceedings. *See supra* at 5.

C.

In addition to the FDIC's repeated motions to intervene and the misleading Letter, the agency has attempted to assist Monogram in other ways. For example, the FDIC attempted to assist Monogram in its Fifth Circuit appeal by publishing General Counsel Opinion No. 12 only *five days* before Monogram's brief was due. Ironically, the FDIC admits that this opinion marked the first time, *in 65 years*, that the agency opined on the meaning of the phrase "engaged in the business of receiving deposits."

Monogram extensively relied on the general counsel opinion in its Fifth Circuit brief. This is not the first time the FDIC has attempted to influence ongoing litigation by publishing its opinions. *See, e.g., Irving Indep. School Dist. v. Packard Properties*, 970 F.2d 58 (5th Cir. 1992) (FDIC published legal memorandum and policy statement after the trial court had ruled against it).

D.

The Attorney General for the State of Louisiana filed an amicus brief in the Fifth Circuit on Ms. Heaton's

behalf because he was troubled over Monogram's and the FDIC's behavior.

Various special interest groups filed amicus briefs on Monogram's behalf in the Fifth Circuit. Not surprisingly, these same groups are apparently filing amicus briefs in support of Monogram's petition for a writ of certiorari.

VI. AT THE REMAND HEARING, THE DISTRICT COURT STRONGLY CRITICIZES THE FDIC'S AND MONOGRAM'S BEHAVIOR IN THE CASE.

At the hearing on the remand motion, the district court severely criticized the agency and its persistent efforts to assist Monogram in the case.

> THE COURT: The FDIC has been helping Monogram throughout. That's no secret.
>
> [FDIC]: No, Your Honor, we don't make it a secret.
>
> THE COURT: . . . You have been helping them from the very beginning. You have assisted them; when you assisted them you obstructed the plaintiffs' discovery. You did not want to be involved in private litigation.

Resp. App. at 13.

The Court then admonished the agency that its intervention request was merely designed to create federal jurisdiction in an effort to help Monogram:

> "To me I can only draw one logical conclusion from all of this: This is simply a maneuver to avoid remand of the case, pure and simple. And nothing else makes any sense to me."

Id.

Judge Barbier is not the only federal judge to criticize the FDIC for attempting to manipulate federal jurisdiction by improperly seeking to intervene in a case. In *Hickey v. NCNB Texas National Bank*, 763 F. Supp. 896 (N.D. Tex. 1991), the court struck down the FDIC's intervention and explained: "The only possible explanation for the intervention was to use on behalf of existing defendants – and, in the court's view, to abuse – the power of removal granted to FDIC-Receiver." *Id.* at 897.

Later in the hearing, the trial court reiterated its grave concerns regarding the FDIC's efforts to assist Monogram in the case. The judge stated:

> "I'm very disturbed I will say this about the actions of the FDIC in this entire matter, and I thought the FDIC was there to protect the public frankly and consumers and not to protect Monogram Bank and similar companies. I thought they were to regulate these companies and not to protect them and to the extent of even defending them in private civil litigation."

Resp. App. at 14.

The district court also emphasized he was not the only one concerned about the FDIC's antics:

> I'm not the only one that is disturbed by the FDIC's actions in this. I'm sure you are aware that among others the attorney general for the State of Louisiana and apparently other attorneys general and consumer advocates around the country **are very disturbed and bothered and critical of the FDIC's actions in this type of litigation. And I must say I agree with them.**

Id. at 15 (emphasis added).

VII. THE CASE IS REMANDED A SECOND TIME.

On January 5, 2001, the federal court remanded the case for lack of subject matter jurisdiction and denied the FDIC's intervention as moot. Resp. App. at 17-25. The decision was comprehensive. The district court thoroughly explained why Monogram was not a State bank and rejected General Counsel Opinion No. 12 as unpersuasive. *Id.* at 21-22.

The first remand order and the second remand order present essentially the same jurisdictional issues. In both rulings, the trial court found it lacked federal question jurisdiction because Monogram did not qualify as a "State bank" and, therefore, could not invoke the federal preemption statute. *Compare* Pet. App. at 21a-22a *with* Resp. App. at 22-23. Similarly, in both orders the trial court found it lacked diversity jurisdiction. *Compare* Pet. App. E at 22a *with* Resp. App. 24-25.

VIII. SUBSEQUENT PROCEEDINGS

In its Petition, Monogram failed to advise the Court of the proceedings that have occurred in the case following the second remand. To ensure the Court has a complete record in rendering its decision, Ms. Heaton supplements as follows:

On January 11, 2001, the FDIC filed a notice of appeal, seeking review of the second remand order and the denial of its intervention request. Resp. App. at 26. The appeal is pending.

The FDIC subsequently moved the district court for a stay of the second remand ruling pending the appeal. On February 14, 2001, the district court denied the FDIC's request for a stay. Resp. App. at 27-30.

Thereafter, the agency moved the Fifth Circuit for a stay pending appeal, claiming such relief was necessary in light of the alleged implications the case presented for the banking industry. On March 22, 2001, in a unanimous decision, the Fifth Circuit refused to issue a stay. Resp. App. at 31. The panel, however, carried with the case Ms. Heaton's motion to dismiss the FDIC's appeal. Resp. App. at 32.

Adding to the procedural complexity is that the FDIC is currently seeking to intervene as a party for the third time, now in State court. Resp. App. at 33 (cover page of motion). The FDIC admits that if the motion is granted, the case will be removed to federal court for a *third* time. Again, the present petition for a writ of certiorari would be moot.

REASONS FOR DENYING THE WRIT

The case is not appropriate for Supreme Court review for the reasons discussed below.

I. THE CASE DOES NOT PRESENT THE QUESTION POSED IN THE PETITION.

The Petition should be denied because the Fifth Circuit decision does not present the question raised by Petitioner. Monogram claims the Court of Appeals refused to review the remand ruling simply because the trial court invoked §1447(c). *See* Petition at i. As a result, the Fifth Circuit "had to ignore" the face of the remand order. Petition at 2.

Monogram's arguments defy common sense and are easily rebutted by a review of the Fifth Circuit's ruling.

The panel carefully scrutinized the remand order and dismissed Monogram's appeal only after concluding the remand was clearly and unambiguously based on §1447(c).

In its analysis, the Fifth Circuit painstakingly reviewed the language of the remand order. The Court of Appeals noted that the district court had specifically found it lacked federal question jurisdiction and that federal preemption did not exist. Pet. App. at 5a. The district court, moreover, specifically invoked §1447(c) in ordering the remand, and stated remand should be granted if federal jurisdiction is in doubt. *Id.*

Further confirming its conclusion that the trial court had remanded under §1447(c), the Court of Appeals recognized that "nowhere in the order did the judge discuss the discretionary factors set forth in *Carnegie-Mellon*, nor did he cite §1367(c)(3) *or any other basis for remand.*" *Id.* at 7a (emphasis added).

After completing its careful review of the district court ruling, the Fifth Circuit saw "no ambiguity whatsoever in Judge Barbier's remand order." *Id.* at 7a. A "plain and common sense reading of . . . Judge Barbier's remand order reveals that he stated a §1447(c) basis for remand." *Id.* at 5a. The district court's "citation of §1447(c) is clearly not a 'mislabeling' of the basis for remand." *Id.* The Court of Appeals concluded: "We think Judge Barbier clearly intended to base his order on §1447(c)." *Id.* at 11a.

In addition, the Fifth Circuit rejected Monogram's invocation of *Bogle* and the argument that the trial court must have exercised jurisdiction in dismissing the federal claim. Instead, it was error for the trial court to dismiss the federal claim because the court had concluded it

lacked jurisdiction. The panel, consequently, reinstated the federal claim. Pet. App. at 11a-12a. Monogram's attempt to convert the district court's error into an argument for a §1367(c)(3) remand is unavailing. *See* Petition at 19-20.

The Fifth Circuit used the phrase "magic words" only once in the opinion when it quoted from the *Bogle* case. Pet. App. at 8a. The Court of Appeals did not suggest it was dismissing Monogram's appeal simply because the trial court had invoked §1447(c). The panel satisfied itself, as Monogram had requested, that the remand was pursuant to §1447(c) and not §1367(c)(3).

Monogram's attempt to portray the Fifth Circuit as a rogue circuit that mechanically dismisses remand orders based on "magic words" is inaccurate. The Petition should be denied because the case does not present the question posed by Monogram.

II. THE PETITION SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT'S DECISION IS PLAINLY CORRECT.

There is little doubt the Fifth Circuit's decision to dismiss the appeal under §1447(d) is consistent with the Court's jurisprudence. The Supreme Court has made abundantly clear that §1447(d) "prohibits review of all remand orders issued pursuant to §1447(c) whether erroneous or not." *Thermtron*, 423 U.S. at 343.

Here, the Fifth Circuit found after reviewing the order that the district court's remand "was based *solely* on §1447(c) grounds". Pet. App. at 9a, n.3 (emphasis added). Thus, following *Thermtron*, the Court of Appeals held "even if Judge Barbier's conclusion that he lacked subject matter jurisdiction was clearly erroneous, he did

not state a non-§1447(c) ground for remand and we cannot review his order." *Id.* at 8a. The Fifth Circuit denied rehearing en banc on this procedural ruling. Pet. App. at 24a-25a.

The cases cited by Monogram did not involve remand orders like the one here. The cases dealt with remand orders that either did not contain reasons for the remand, or were facially ambiguous on why the remand had been granted. *See e.g., Mangold v. Analytic Serv., Inc.*, 77 F.3d 1442 (4th Cir. 1996) (remand order cites §1447(c) and discusses factors relating to discretionary remand); *Transit Casualty Co. v. Certain Underwriters at Lloyd's*, 119 F.3d 619, 624 (8th Cir. 1997) ("district court's citation to §1447(c) was somewhat ambiguous"); *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1350 (11th Cir. 1998) (district court did not state the statutory basis for its remand order); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (court did not explain why case was remanded); *Zuniga v. Blue Cross & Blue Shield*, 52 F.2d 1395, 1400 (6th Cir. 1995) (district court did not specify reasons for remanding counts).

III. THE PETITION SHOULD BE DENIED BECAUSE MONOGRAM HAS WAIVED ITS RIGHT TO SEEK REVIEW OF THE FIFTH CIRCUIT DECISION.

Monogram has waived the right to seek review of the Fifth Circuit ruling in this Court. Monogram embraced the decision as correct when Monogram relied on it to establish federal question jurisdiction and re-remove the case. *See* Resp. App. at 7 & 9. Monogram attached the Fifth Circuit's decision as an exhibit to the Notice of Removal and did not claim the ruling was in error or subject to further review. *Id.*

Only now, after the district court remanded the case for a second time, does Monogram reverse course and argue the Fifth Circuit's decision was in error. Having adopted the ruling, Monogram cannot disown it. Monogram has waived its right to seek review of the decision and is judicially estopped from taking such inconsistent positions. *See Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.), *cert. denied*, 121 S. Ct. 59 (2000) (Judicial estoppel "is a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position."); *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000) (doctrine "is to protect the integrity of the judicial process by preventing the parties *from playing fast and loose* with the courts to suit the exigencies of self interest") (quotations and alterations omitted) (emphasis added).

IV. THE PETITION SHOULD BE DENIED AS MOOT.

By removing the case a second time, Monogram mooted the first remand ruling and this certiorari petition. The question now is whether the second remand ruling was proper. This is the subject of a pending Fifth Circuit appeal. If the Court of Appeals reverses the second remand order, the case may be back in federal court.

Similarly, the FDIC has sought to intervene in state court. Resp. App. at 33-34. If granted, the FDIC and Monogram have indicated the case will be removed to federal court for a *third* time. Such a removal would spawn additional jurisdictional litigation, and again moot the first remand ruling. Thus, any decision rendered by the Court relating to the first remand ruling is simply advisory in nature.

Alternatively, the Court may wish to remand the matter to the Fifth Circuit to determine whether the now-superceded first remand ruling remains a live controversy. *See Scott v. Kentucky Parole Board*, 429 U.S. 60, 61 (1976) ("The Court postpones decision of the issue by sending the case back to the Court of Appeals for its advice on the question whether the litigation is now moot.") Such action may be appropriate in light of the pending FDIC appeal on the second remand ruling.

V. THE PETITION SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT'S DECISION FURTHERS PUBLIC POLICY.

The Fifth Circuit's decision in this case furthers public policy and should not be disturbed. Permitting a party, like Monogram, to re-write the clear and unambiguous basis for a remand ruling would clearly lead to undesirable results. Future litigants who want to circumvent §1447(d) will simply claim to have discovered the "real" reason for the trial court's remand. The appellate floodgates will open and consistency will be lost.

Congress enacted §1447(d) to avoid protracted jurisdictional litigation. *Thermtron*, 423 U.S. at 351. Monogram's request that the lower court's decision be re-written to permit an appeal directly contravenes this congressional goal.

Moreover, this particular case begs for the application of §1447(d). The jurisdictional wrangling has gone on for more than three years, and it is time to reach the merits of the case. The State Court is certainly capable of resolving the federal issues presented in the case, and the remand rulings do not carry any preclusive effects. Pet. App. at 11a.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

May 18, 2001

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA HEATON, on behalf of herself and all others similarly situated,	**CIVIL ACTION NO. 98-1823 c/w No. 99-2603**
Plaintiff,	**SECTION "J"**
v.	
MONOGRAM CREDIT CARD BANK OF GEORGIA,	**MAGISTRATE 1**
Defendant.	(Filed Dec. 3, 1999)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendant Monogram Credit Card Bank of Georgia ("Monogram") hereby appeals to the United States Court of Appeals from the November 22, 1999 order by the District Court, which remanded plaintiff's breach of contract and Louisiana Consumer Credit Law ("LCCL") claims to state court.

The District Court dismissed with prejudice a federal claim that had been brought by plaintiff under the Truth in Lending Act ("TILA"), 15 U.S.C. §1601, *et seq.*, as the predicate to its order remanding the remaining claims to state court. Federal subject matter jurisdiction indisputably existed by reason of plaintiff's assertion of the TILA claim, and federal jurisdiction was clearly exercised when the District Court granted plaintiff's motion for voluntary

dismissal of the TILA claim with prejudice. Therefore, the remand of the remaining claims immediately following the Court's dismissal with prejudice of the TILA claim was necessarily made under 28 U.S.C. §1367(c)(3), not 28 U.S.C. §1447(c). As the Fifth Circuit stated in *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994):

> The critical distinction for determining appealability is the presence of federal subject matter jurisdiction prior to the order of remand. In a Section 1447(c) remand, federal jurisdiction *never* existed, and in a non-Section 1447(c) remand, federal jurisdiction *did exist* at some point in the litigation, but the federal claims were either settled or dismissed. (emphasis in original).

See Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1350-1351 and n. 3 (11th Cir. 1998) (plaintiff amended complaint after removal to add ERISA claim; court later dismissed ERISA claim and remanded remaining claims; remand order was therefore necessarily made under Section 1367(c)(3), not Section 1447(c), and was appealable).

Where a federal claim is dismissed and thereafter the remaining claims are remanded to state court, the remand is made pursuant to the discretionary authority of 28 U.S.C. §1367(c)(3) and is appealable as a matter of right under 28 U.S.C. §1291. *See, e.g., Guzzino v. Felterman*, 191 F.3d 588, 594 and n. 7 (5th Cir.1999); *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). The mere fact that the District Court erroneously cited 28 U.S.C. §1447(c), rather than 28 U.S.C. §1367(c)(3), as the basis for its remand following the dismissal with prejudice of the TILA claim does not render the remand order non-

reviewable. *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1450-1451 (4th Cir. 1996).

PROCEDURAL BACKGROUND

The remand order by Judge Barbier was entered on a "Motion for Reconsideration" filed by plaintiff more than one year after the prior denial of her remand motion by Judge Porteous, the judge originally assigned to this case. Judge Porteous denied remand on October 7, 1998, specifically concluding that Monogram is a "state bank" under Section 3(a)(2) of the Federal Deposit Insurance Act, 12 U.S.C. §1813(a)(2), and therefore plaintiff's LCCL claim was completely preempted by Section 27 of that Act, 12 U.S.C. § 1831d. Directly contrary to Judge Porteous' ruling, Judge Barbier concluded in his November 22, 1999 remand order that Monogram is *not* a "state bank." Both Judge Porteous and Judge Barbier stated that their rulings were supported by the "plain language" of the Federal Deposit Insurance Act, but they reached diametrically opposed positions on the meaning of that "plain language." Judge Barbier did not even mention the prior contrary decision by Judge Porteous, nor did he offer any explanation for reversing Judge Porteous' ruling, which was the law of the case. *See Loumar v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) ("when a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision"). Judge Barbier's remand order was not only contrary to the denial of remand by Judge Porteous, it was also contrary to Judge Barbier's own decision a year earlier, on November 25,

1998, wherein he denied plaintiff's motion for interlocutory appeal of Judge Porteous' denial of remand and stated that "plaintiff has not shown a substantial ground for difference of opinion as to whether defendant is a state bank. Plaintiff cites no authority for the contention that defendant is not a state bank."

In addition, Judge Barbier issued his remand order within one business day of being advised in writing of the Federal Deposit Insurance Corporation's ("FDIC") intent to intervene immediately in this case. As Monogram advised the District Court prior to its remand order, FDIC intervention would have created an independent basis for federal jurisdiction. *See* 12 U.S.C. §1819(b). The FDIC's brief in support of intervention states: "For the FDIC, the impact of a decision by the Court in this area extends beyond the fate of Monogram and may affect hundreds of similarly situated FDIC-insured institutions processing billions of dollars in transactions. A decision adverse to Monogram may literally open the floodgates of litigation and deluge the institutions regulated by the FDIC with a torrent of similarly frivolous suits." The FDIC's motion to intervene was filed before the remand order was entered, but was not acted on by Judge Barbier prior to the remand.

Respectfully submitted,

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Attorneys for Defendant Monogram Credit Card Bank of Georgia

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA HEATON, Individually and on behalf of herself and all others similarly situated,	**CIVIL ACTION NO. 00-3260**
Plaintiff,	**SECTION "I"**
v.	**MAGISTRATE 5**
MONOGRAM CREDIT CARD BANK OF GEORGIA,	
Defendant.	

NOTICE OF REMOVAL

Defendant Monogram Credit Card Bank of Georgia ("Monogram"), while fully reserving its rights to object to any matters, including without limitation, service, jurisdiction, and venue, and without waiving any other defenses or objections to the plaintiff's allegations, has removed to this Court the case captioned, *Patricia Heaton, Individually and on Behalf of Herself and All Others Similarly Situated, v. Monogram Credit Card Bank of Georgia*, No. 98-8275, Div. D, originally filed in the Judicial District Court for the Parish of Orleans, State of Louisiana, by plaintiff Patricia Heaton.

1.

This Court's removal jurisdiction is based on federal question jurisdiction as provided in 28 U.S.C. §§ 1331 and 28 U.S.C. §§ 1441(a) and (b).

2.

Plaintiff has alleged a violation of the Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et. seq., which constitutes a claim arising under the laws of the United States. The United States Fifth Circuit Court of Appeals voided the district court's order dismissing the TILA claim and further noted that Monogram could again remove the matter to federal court based on the reinstatement of the TILA claim. *See* November 2, 2000 Opinion attached as Exhibit 1.

3.

In addition, plaintiff's allegations that Monogram's charges violate Louisiana law are completely preempted by Section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. § 1831(d)(a), which also constitutes a claim arising under the laws of the United States.

4.

Diversity jurisdiction exists under 28 U.S.C. § 1332 as the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between citizens of different states.

5.

At all relevant times hereto, plaintiff is and has been a citizen of Louisiana and Monogram is and has been a federally-insured state bank located in Georgia.

6.

Plaintiff brings this action not only on her own behalf, but also as a class action pursuant to article 591 of the Louisiana Code of Civil Procedure.

7.

Plaintiff has asked for an award of "reasonable attorney's fees."

8.

The Fifth Circuit has held in *In Re Abbot Laboratories*, 51 F.3d 524 (5th Cir. 1995) that, pursuant to La. Code Civ. Proc. art 595, the entire amount of attorney's fees are attributable to the class representatives.

9.

Clearly, given the size of the putative class and the nature of the claims asserted, the potential counsel fee is in excess of $75,000.

10.

This Court has supplemental jurisdiction over all other claims asserted by plaintiff in accordance with 28 U.S.C. §§ 1367(a) and 1441(c).

11.

Removal is timely under 28 U.S.C. § 1446(b) as less than thirty days have passed since the United States Fifth Circuit Court of Appeals November 2, 2000 decision voided the order entered in the federal court proceedings which dismissed the federal TILA claims alleged by the plaintiff. As a result, the TILA claims are reinstated in these proceedings, thereby creating a basis for removal to federal court.

12.

A Copy of this Notice of Removal has been sent to counsel of record for the plaintiff and has been filed with the Clerk of Court for the Parish of Orleans, State of Louisiana.

13.

Attached to this Notice of Removal as Exhibit 2 are copies of all process, pleadings and orders filed in the state court record through this date.

Respectfully submitted, this 3rd day of November, 2000.

Respectfully submitted,

/s/ Lauren Z. Garvey
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ATTORNEYS FOR MONOGRAM CREDIT CARD BANK OF GEORGIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA HEATON,	CIVIL ACTION
Plaintiff	NO. 98-1823 – "J"
v.	New Orleans, Louisiana
MONOGRAM CREDIT CARD, ET AL.	Wednesday, December 20, 2000
	10:00 a.m.
Defendants.	

ORAL ARGUMENT ON SEVERAL MOTIONS
BEFORE THE HONORABLE CARL J. BARBIER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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and

* * *

[31] THE COURT: You have been helping them from the very beginning in this case.

MR. TAYLOR: That's not something to apologize for.

THE COURT: I'm not suggesting you ought to apologize. I'm just trying to get the facts out. You have been helping them from the very beginning. You have assisted them; when you assisted them, you obstructed the plaintiffs' discovery. You did not want to be involved in private litigation. Now all of a sudden this is this great interest of the FDIC. To me I can only draw one logical conclusion from all of this: This is simply a maneuver to avoid remand of the case, pure and simple. And nothing else makes any sense to me. If that is the only reason the FDIC wants to intervene, I don't think you have a basis for intervening.

MR. TAYLOR: No, Your Honor.

THE COURT: I'm not going to allow it.

MR. TAYLOR: No, Your Honor, that is not our sole basis for intervening. As we stated in our papers, what we seek to do is defend our decision in 1988 to insure Monogram Bank and our determination that it was, in fact, a state bank under the FDI Act.

Two, we are here to reserve territory on this issue within the industry. Since 1991 we have –

THE COURT: Monogram has the same interests on both of those points as you do, don't they?

MR. TAYLOR: They may be aligned at this point, yes.

THE COURT: Okay. Why then isn't your interest [32] protected?

MR. TAYLOR: Well, Your Honor, there is a difference between participating in a case as a *amicus* versus as a party. As a party we have a right to appeal. We have a right to brief issues. We have a right to take discovery and present evidence. As a matter of fact, those –

THE COURT: Exactly what you said you didn't have the resources to do a year ago. Now you want to do all of that.

MR. TAYLOR: That was –

THE COURT: You aren't going to depose that guy who gave that affidavit for a deposition if I let you intervene?

MR. TAYLOR: We just think that is frivolous and it is a red herring. The entire thing is a red herring.

THE COURT: I'm not sure about that. If I kept this case, I would be very interested in learning exactly what went on and why. It is very curious to me that a federal agency – I'm very disturbed I will say this about the actions of the FDIC in this entire matter, and I thought the FDIC was there to protect the public frankly and consumers and not to protect Monogram Bank and similar companies. I thought they were to regulate these companies and not to protect them and to the extent of even defending them in private litigation. I just don't understand the FDIC's whole position in this case. I mean what difference does it make if you have to go back to a

MD if ultimately these banks have to go to Congress to get the law changed which they have a perfect right to [33] do? What difference does it make if you have to regulate these state banks? Don't you have another bank to regulate?

MR. TAYLOR: You put you [sic] finger on the point when you said that the FDIC should be regulating these institutions. Our ability –

THE COURT: I said they regulate what they have to regulate and protect consumers, and I don't view your mission as being to protect the industry. And that seems to be what you, what the FDIC considers its mission to be.

I'm not the only one that is disturbed by the FDIC's actions in this. I'm sure you are aware that among others the attorney general of the State of Louisiana and apparently other attorneys general and consumer advocates around the country are very disturbed and bothered and critical of the FDIC's actions in this type of litigation. And I must say I agree with them. I apologize for interrupting you on this, but I wanted to do so at the very beginning.

Let met put on the record that I received several letters in connection with this matter dated December 5, 2000, from the State of Louisiana, Office of Financial Institutions, from a Mr. Gary L. Newport, Chief Attorney. Is Mr. Newport in Court?

(No response.)

THE COURT: He is not here. I don't know Mr. Newport. He is an attorney so I assume he is licensed in

Louisiana since he represents the Office of Financial Institutions for the State of

* * *

United States District Court, E.D. Louisiana.

Patricia HEATON, on Behalf of Herself and All Others Similarly Situated

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

No. Civ.A. 98-1823.

Jan. 5, 2001.

ORDER AND REASONS

BARBIER, J.

Before the Court are Plaintiffs' Motion to Remand (Rec.Doc. 108), Defendant's Motion to Add the Federal Deposit Insurance Corporation ("FDIC") as a Necessary Party Defendant (Rec.Doc. 110), and FDIC's Motion for Leave to Intervene as a Party Defendant (Rec.Doc. 103). The motions were set for hearing with oral argument on December 20, 2000, at which time the Court took the matter under advisement. After considering the memoranda and argument presented by counsel, the Court concludes that it is without subject matter jurisdiction to hear this case. Accordingly, Plaintiffs' motion to remand this case to the Civil District Court for the Parish of Orleans is GRANTED. The remaining two motions are DISMISSED AS MOOT.

Background

In 1998, Patricia Heaton filed a class action suit against defendant Monogram Credit Card Bank of Georgia ("Monogram") in state court alleging that Monogram had violated the Louisiana Consumer Credit Law

("LCCL") by charging excessive credit card late fees and interest. Monogram removed the case to this Court and Plaintiffs' subsequent motion to remand was denied. Resigned to pursuing their case in federal court, Plaintiffs then, over Monogram's objection, amended their complaint to add a federal Truth in Lending Act ("TILA") claim. However, as the case progressed in this Court, Plaintiffs discovered information which prompted them to reurge their motion to remand. On November 22, 1999, this Court determined that it was without subject matter jurisdiction and remanded the case to state court. At the same time, the Court permitted Plaintiffs to dismiss their federal TILA claim.

Rather than proceed in state court, Monogram sought to appeal the remand order to the Fifth Circuit Court of Appeals. On November 2, 2000, the Fifth Circuit dismissed Monogram's appeal concluding that 28 U.S.C. § 1447(d) precluded appellate review. *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 995 (5th Cir.2000). However, the Fifth Circuit reinstated the TILA claim noting that Monogram would have immediate grounds to once again remove the case to federal court – this time based on federal question jurisdiction due to the pending TILA claim. *Id.* at 1000 n. 6. Shortly after the Fifth Circuit issued its ruling, however, Plaintiffs amended their state court petition to delete the federal TILA claim. Monogram then, for the second time, removed the case to this Court. Soon thereafter, FDIC moved to intervene in the suit, Monogram sought to add FDIC as a necessary party, and Plaintiffs once again moved to remand the case to state court.

Discussion

The Court begins its analysis with Plaintiffs' motion to remand. The arguments made by both sides are essentially the same as those made over a year ago when Plaintiffs last moved to remand this case. Monogram argues that it qualifies as a "State bank" under the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. § 1811, *et seq.*) and that section 1831d(a) of the FDIA preempts state law causes of action against State banks. Moreover, Monogram argues that the preemption created by section 1831d(a) is complete so as to allow removal of this case to federal court. Monogram also asserts that the possibility of attorney's fees as part of Plaintiffs' potential award meets the jurisdictional amount for diversity jurisdiction. Plaintiffs, on the other hand, argue that the Court is without subject matter jurisdiction because Monogram is not a State bank, and even if it is, section 1831d(a) does not completely preempt state law claims so as to allow removal to a federal court.

The Court considered the State bank issue over a year ago when the case was remanded the first time. At that time, the Court determined that Monogram, a "credit card" bank chartered under Georgia law, was *not* a State bank within the meaning of the FDIA. *Heaton v. Monogram*, 1999 WL 1789422, at *1 (E.D.La. Nov. 22, 1999). In reaching that conclusion, the Court relied on the plain language of 12 U.S.C. § 1813(a)(2) which defines a State bank as "any bank . . . engaged in the business of receiving deposits . . . and incorporated under the laws of any State. . . . " Although Monogram received deposits from its parent company, it was not "engaged in the business" of receiving deposits from its customers. Accordingly, the

Court concluded that Monogram was not a State bank, and therefore, federal preemption did not apply. *Heaton*, 1999 WL 1789422, at *1.

In opposition to the current motion to remand, Monogram urges the Court to reconsider its prior conclusion on the State bank issue. In support of its position, Monogram directs the Court's attention to several factors that the Court did not have the benefit of considering last time.[1] First, FDIC has since issued General Counsel's Opinion No. 12 ("GCO-12"), in which FDIC sets forth its interpretation of "engaged in the business of receiving deposits." Monogram's Exh. F. According to GCO-12, the statutory requirement of being "engaged in the business of receiving deposits" is satisfied by the continuous maintenance of one or more non-trust deposits in the aggregate amount of $500,000. *Id.* at 1 (65 Fed.Reg. 14568). Second, Monogram points out that it does in fact receive "deposits" from its customers because Monogram accumulates credit balances from customers who overpay their credit card accounts. Finally, Monogram points out that pursuant to recent changes in Georgia law, it now accepts deposits from unaffiliated parties. Monogram's Exh. H, ¶ 2-3.

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[1] In its memorandum and at oral argument, Monogram also argued of the potential chaos that would ensue if courts began to "second-guess" FDIC's determination of State bank status. Implicit in FDIC's 1988 decision to insure Monogram was a finding by FDIC that Monogram was a State bank. While Monogram and FDIC made persuasive arguments on this point, those policy arguments are best left for Congress to resolve rather than the judiciary.

It is important to note that the issue is not whether Monogram "receives deposits" – it likely does. But section 1813(a)(2) does not define a State bank as one that "receives deposits." Rather, a State bank is one *engaged in the business* of receiving deposits. 12 U.S.C. § 1813(a)(2). While the statute does not define "engaged in the business," the Court must assume that Congress added the phrase for some purpose, and therefore, must interpret section 1813(a)(2) so as to give meaning to the phrase. Thus, even assuming that overpayments by credit card customers would qualify as "deposits" under 12 U.S.C. § 1813(1), a premise that in and of itself is not completely clear, it does not necessarily follow that Monogram is engaged in the business of receiving deposits as that term is used in the statute.

Similarly, the fact that the Georgia statutes under which Monogram is chartered now allow Monogram to accept deposits from non-affiliates does not necessarily lead to the conclusion that Monogram is engaged in the business of receiving deposits. Even with the changes in Georgia's banking law, Monogram's ability to accept deposits is still extremely limited. *See* Ga. Stat. § 7-5-3(7). And the law under which Monogram is chartered still dictates that Monogram may only engage in the business of soliciting, processing, and making loans pursuant to credit card accounts. . . . " Ga. Stat. § 7-5-3(6).[2] Thus, the *per se* restrictions imposed by the state law governing

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[2] Furthermore, the statutory changes at issue were made well after Plaintiffs' cause of action arose and this suit was filed. Accordingly, the changes in Georgia law would likely be inapplicable to this lawsuit.

Monogram's operations militate against finding that Monogram engages in the business of receiving deposits.

Finally, GCO-12 does not convince the Court that Monogram engages in the business of receiving deposits. Undoubtedly, Monogram's activities qualify as "engaged in the business of receiving deposits" as FDIC interprets the phrase in GCO-12, and if the Court were bound by GCO-12 it would be compelled to find that Monogram is a State bank. But given that GCO-12 is an opinion letter, it is not entitled to *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 1662-63, 146 L.Ed.2d 621 (2000). Rather, it is "entitled to respect" but only to the extent that the opinions and interpretations expressed therein have the power to persuade. *Id.* Reviewing GCO-12 in light of section 1813(a)(2) it would seem that FDIC's interpretation of "engaged in the business of receiving deposits" ignores at least one aspect of the statute. Section 1813(a)(2) refers to *deposits* in the plural which would seem to indicate that Congress envisioned a State bank to have at minimum more than one deposit. FDIC, on the other hand, seems to completely ignore this and under its interpretation, a *single* deposit of $500,000 suffices. At oral argument, counsel was unable to explain the significance of the $500,000 figure chosen by FDIC. Simply said, the Court is unable to discern how FDIC's interpretation of "engaged in the business of receiving deposits," as explained in GCO-12, gives effect to the language of the statute as Congress wrote it. Accordingly, the Court does not find GCO-12 persuasive.

Thus, having considered Monogram's new arguments, the Court once again concludes that Monogram is

not "engaged in the business of receiving deposits." Consequently, it does not meet the definition of a State bank under the FDIA. Given that Monogram is not a State bank, preemption, whether ordinary or complete, does not apply.[3]

However, assuming *arguendo* that Monogram is a State bank, the Court would nevertheless find removal improper because the Court is convinced that section 1831d does not completely preempt state law causes of action. While neither the Fifth Circuit nor the United States Supreme Court has addressed whether 12 U.S.C. § 1831d(a), the preemption provision of the FDIA, completely preempts state law causes of action, the Fifth Circuit has recognized that the doctrine of complete preemption is to be narrowly applied, that few federal statutes meet the standards necessary to show complete preemption, and that the doctrine should be applied with "circumscription." *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 500 (5th Cir.1999). Further, the Fifth Circuit requires evidence of clear Congressional intent to show that claims preempted by state law are removable. *Id.; Aaron v. National Union Fire Ins.*, 876 F.2d 1157, 1165 (5th Cir.1989). Monogram points to nothing in the FDIA or its legislative history that evidences such intent. And while other courts have reached a contrary

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[3] The Court's determination on this issue will have no preclusive effect in state court because a remand order is jurisdictional in nature. *Heaton*, 231 F.3d at 1000 (citing *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir.1999)). Thus, all of the same defenses and arguments made to this Court, including ordinary preemption, are available to Monogram in state court.

conclusion, *see, e.g., M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608 (8th Cir.1991) (holding that the National Bank Act completely preempts state law claims for usurious interest), the Court finds the reasoning employed in cases such as *Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350 (S.D.Ala. Oct. 2, 2000) (holding that there is no complete preemption under the NBA), more persuasive. The district judge in *Jones* conducted a detailed and comprehensive analysis of complete preemption under sections 85 and 86 of the National Bank Act, the sister statutes to section 1831d, and found absent the requisite congressional intent to allow removal under the complete preemption doctrine. The Court is persuaded that the reasoning employed in *Jones* is consistent with the standards enunciated by the Fifth Circuit in *Heimann* and *Aaron*.

Finally, the Court concludes that there is no diversity jurisdiction because Monogram has failed to demonstrate that Plaintiffs' claims meet the jurisdictional amount. Monogram argues that if Plaintiffs avail themselves of the attorney fee provisions of the LCCL then Heaton, as the sole named plaintiff, will have a claim exceeding $75,000. *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir.1995). However, Plaintiffs amended their state court petition prior to removal to clarify that they are not seeking attorney's fees under the LCCL. Plaintiffs' Exh. 25, at 4, ¶ 10. Plaintiffs' counsel also stipulated on the record at oral argument that Plaintiffs are not claiming and will not attempt to claim attorney's fees under the LCCL. This Court has previously held that attorney's fees are attributed to the class representative only when awarded pursuant to a specific statute. *Jones v. Valvoline Co.*, 1999 WL

319215 (E.D.La. May 20, 1999). Given then that Plaintiffs do not seek attorney's fees pursuant to a statute, an attorney's fee award is not relevant to a claim of diversity jurisdiction in this case. Monogram has not otherwise shown that Heaton's claims meet the jurisdictional amount. Accordingly, the Court finds that it does not have diversity jurisdiction over this suit.

In conclusion, the Court finds that Monogram is not a State bank, and even if it is, Plaintiffs' claims are not completely preempted by federal law. The Court does not have diversity jurisdiction. Consequently, this Court is without subject matter jurisdiction to hear this case. The suit is remanded to state court pursuant to 28 U .S.C. § 1447(c). Given the Court's decision to remand the case, FDIC's motion to intervene and Monogram's motion to add FDIC are moot. Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Remand should be and is hereby GRANTED. The case is remanded to the Civil District Court for the Parish of Orleans. The request for attorney's fees and costs is DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Add the Federal Deposit Insurance Corporation as a Necessary Party Defendant is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that FDIC's Motion for Leave to Intervene as a Party Defendant is DISMISSED AS MOOT.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Patricia Heaton, Plaintiff, v. Monogram Credit Card Bank of Georgia, et al., Defendants.	)	Case No. 98-1823 Section J Magistrate 1

NOTICE OF APPEAL

Notice is hereby given that the Federal Deposit Insurance Corporation ("FDIC") hereby appeals to the United States Court of Appeals for the Fifth Circuit from the District Court's Order of January 5, 2001 insofar as it dismisses as moot the FDIC's Motion for Leave to Intervene as a Party Defendant and grants the Plaintiffs' Motion to Remand.

Respectfully submitted,

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Senior Counsel

/s/ Gregory F. Taylor

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United States District Court, E.D. Louisiana.

Patricia HEATON, on Behalf of Herself and All Others Similarly Situated

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

No. Civ.A. 98-1823.

Feb. 14, 2001.

BARBIER, J.

Before the Court is a motion for stay filed by the Federal Deposit Insurance Corporation ("FDIC") (Rec.Doc. 136). Plaintiffs oppose the motion. The motion, set for hearing on February 14, 2001, is before the Court on briefs, without oral argument.

The convoluted procedural background of this case is fully explained in the Court's January 5, 2001 Order and Reasons (Rec.Doc. 133). In that order, the Court explained why it was without subject matter jurisdiction to hear Plaintiffs' suit against Monogram Credit Card Bank of Georgia ("Monogram"). The Court remanded the case to state court pursuant to 28 U.S.C. § 1447(c). At the same time, the Court dismissed as moot FDIC's motion to intervene in the suit, as well as defendant Monogram's motion to add FDIC as a necessary party. FDIC is appealing those rulings and now asks the Court to stay the remand order pending the outcome of its appeal.

In support of its motion for a stay, FDIC argues that this case satisfies the Fifth Circuit's criteria for a stay pending appeal because, among other things, FDIC has a substantial likelihood of success on the merits. As the Court sees it, however, the crucial threshold question is

whether the Court would have jurisdiction to grant FDIC's request should it find FDIC's arguments meritorious. After reviewing the applicable law and the authorities cited by FDIC,[1] the Court concludes that it lacks jurisdiction to issue a stay.

Where an appellate court has jurisdiction to review a remand order, the district court retains jurisdiction to modify or vacate the order. *In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir.1991) (quoting *Browning v. Navarro*, 743 F.2d 1069 (5th Cir.1984)). Appellate courts have no jurisdiction to review an order remanding a case to state court when the federal district court determines that it lacks subject matter jurisdiction. 28 U.S.C. § 1447(d); *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir.2000). Accordingly, it is well-settled that federal courts are completely divested of jurisdiction following a remand to state court based upon a finding that the court lacks subject matter jurisdiction. *New Orleans Pub. Serv. v. Majoue*, 802 F.2d 166, 167 (5th Cir.1986).

FDIC cites 12 U.S.C. § 1819(b)(2)(c) and a host of cases for the proposition that FDIC can appeal any order of remand issued by a district court. And given that FDIC can appeal any order of remand, it follows that this Court retains jurisdiction to issue a stay.

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[1] FDIC did not brief the issue of jurisdiction. Defendant Monogram, without leave of court, filed a memorandum in support of FDIC's motion for a stay. Monogram addressed jurisdiction in its memorandum. To simplify matters, the Court will refer to Monogram's arguments on the jurisdictional issue as if they had in fact been presented by FDIC.

While FDIC's cited authorities unarguably establish that FDIC can appeal an otherwise unreviewable remand order, those authorities do nothing to bolster FDIC's contention that it can appeal the remand order issued in *this* case – a case where FDIC was never a party to the suit. For the same reason, FDIC's reliance on section 1819(b)(2)(c) rings hollow. The Court is persuaded that the remand order in this case is not reviewable at FDIC's request.[2]

Nor is the Court persuaded that the Court's dismissal of FDIC's motion to intervene as moot is appealable. *Afram Carriers, Inc. V. Moeykens,* 145 F.3d 298, 300 (5th Cir.1998), cited by FDIC, recognizes that the denial of an intervention as of right is an appealable final order under 28 U.S.C. § 1291. In this case, the Court did not deny FDIC's motion to intervene but rather dismissed it as moot after finding that the Court lacked subject matter jurisdiction. Accordingly, FDIC remains free to seek intervention in the state court, and therefore, suffers no prejudice in not having its motion to intervene heard by this Court.

In sum, the Court concludes that its January 5, 2000 order is non-reviewable on appeal. It follows then that this Court is completely divested of jurisdiction, and therefore, without power to issue a stay. Accordingly;

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[2] The Court notes that the procedural posture of the case at this time is virtually identical to the procedural posture of the case when Monogram sought to appeal the last remand order. Under that virtually identical procedural posture, the Fifth Circuit held that the remand order was not appealable. *Heaton,* 231 F.3d at 1000.

IT IS ORDERED that FDIC's motion for a stay should be and is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30104

PATRICIA HEATON

Plaintiff-Appellee

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

Defendant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Movant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

(Filed Mar. 22, 2001)

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that movant-appellant's motion for stay pending appeal is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30104

PATRICIA HEATON

Plaintiff-Appellee

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

Defendant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Movant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

Before EMILIO M. GARZA, STEWART, and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellee's motion to dismiss appeal for lack of jurisdiction is carried with the case.

Judge Stewart dissents and would GRANT the motion to dismiss the FDIC's appeal for lack of jurisdiction.

/s/ CES

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 98-8275 SECTION "16"

DIVISION "D"

PATRICIA HEATON, Individually and on behalf of herself and all others similarly situated,

VERSUS

MONOGRAM CREDIT CARD BANK OF GEORGIA

FILED: _____ _____
DEPUTY CLERK

MOTION FOR LEAVE TO FILE PETITION IN INTERVENTION

NOW INTO COURT, through undersigned counsel, comes the Federal Deposit Insurance Corporation ("FDIC" or "Petitioner in Intervention"), who pursuant to Articles 1031 and 1033 of the Louisiana Code of Civil Procedure, moves this Court for leave to file the attached Petition in Intervention. For the reasons set forth in the FDIC's accompanying Memorandum in Support of its motion for leave to file Petition in Intervention, Petitioner in Intervention avers that the intervention is proper and

that the filing of this petition will not retard the progress of the principal action.

Respectfully submitted,

/s/ James A. Brown
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Attorneys for Federal Deposit Insurance Corporation, Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been served upon counsel of record by hand delivery this 3d day of April, 2001.

/s/ James A. Brown
James A. Brown

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

PATRICIA HEATON, Individually and on behalf of herself and all others similarly situated Plaintiff VERSUS MONOGRAM CREDIT CARD BANK OF GEORGIA Defendant	*	DOCKET NO. 98-1823-J c/w 99-2603-J New Orleans, Louisiana November 10, 1999 9:30 A.M.

THE FOLLOWING IS A TRANSCRIPT OF MOTIONS HEARD BEFORE THE HONORABLE CARL BARBIER, PRESIDING JUDGE ON THE 10th DAY OF NOVEMBER, 1999.

APPEARANCES:

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* * *

[33] illegal or wrong, but it seems to me the sole reason for them insuring this minute fraction of their deposits is to get qualified as a state bank under the statute. I want you to tell me if I am wrong.

MR. RUBLIN: Your Honor, that's the most insurance they can get. They can get a hundred thousand dollars per deposit.

THE COURT: You haven't answered my question. Is there any other reason for them to carry this insurance?

MR. RUBLIN: It is part of being a state bank. They want to be a state bank.

THE COURT: That's the sole reason for it, really.

MR. RUBLIN: Yes. There is nothing improper about that.

THE COURT: I never said there was. Why didn't you say that when I asked you five minutes ago instead of beating around the bush with it?

MR. RUBLIN: Well, Your Honor, it is integral to their function as a state bank, as a credit card bank, that they be insured as a depository institution by the FDIC. That comes with regulation by the FDIC. That comes with periodic examinations by the FDIC. There are hundreds of credit card banks, Your Honor, around the country. Monogram is one of many hundreds of credit card banks. This

* * *

(3)

FILED

MAY 18 2001

CLERK

No. 00-1505

IN THE

Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,

Petitioner,

v.

PATRICIA HEATON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS AND STATE OF GEORGIA DEPARTMENT OF BANKING AND FINANCE IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS AND STATE OF GEORGIA DEPARTMENT OF BANKING AND FINANCE IN SUPPORT OF PETITIONER

Amici Curiae Conference of State Bank Supervisors ("CSBS") and State of Georgia Department of Banking and Finance ("Georgia Department") respectfully submit this brief in support of Petitioner, Monogram Credit Card Bank of Georgia ("Monogram").[1]

INTEREST OF AMICI CURIAE

CSBS is the professional association of state officials responsible for chartering, regulating and supervising nearly 7,000 state-chartered banks and over 400 state-licensed branches and agencies of foreign banks. Since 1902, CSBS has been the primary national representative and advocate for the state banking system, and CSBS has often participated in cases raising important issues for state banks and state bank regulators.

The Georgia Department is the agency responsible for administering the banking laws of the State of Georgia, including provisions dealing with the chartering and regulation of Georgia state banks. The Georgia Department has a direct supervisory interest in this case, because it granted a state bank charter to Monogram on February 16, 1988, and this case arose out of credit card transactions between Monogram and Respondent, Patricia Heaton, a resident of Louisiana ("Heaton").

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici have significant concerns about the Fifth Circuit's decision in this case. As explained in the petition (*see* Pet. 6-8), the Fifth Circuit declined to overturn a district court order that remanded this case to state court for lack of federal jurisdiction. The Fifth Circuit thereby failed to correct a clearly erroneous holding of the district court on an issue of great importance to the state banking system. More specifically, the district court refused to defer to an expert determination of the Federal Deposit Insurance Corporation ("FDIC") and instead held that Monogram is not a "State bank" under the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* ("FDIA").

As explained below, the district court's ruling threatens to undermine, with respect to state-chartered credit card banks, the competitive equality that Congress has established between state banks and national banks in the charging of interest rates on loans. In addition, the district court's ruling calls into question the ability of bank regulators, bank officials and bank customers to rely on the FDIC's approval of deposit insurance for state-chartered credit card banks and similar special-purpose depository institutions. As a result, the district court's ruling threatens to disrupt, as to such institutions, the carefully balanced system of federal and state regulation that Congress has mandated under the FDIA. *Amici* therefore strongly support Monogram's efforts to obtain review by this Court of the Fifth Circuit's decision. *Amici* share Monogram's view that the Fifth Circuit should have exercised appellate jurisdiction for the purpose of correcting the district court's misguided construction of the FDIA.

REASONS FOR GRANTING THE PETITION

I. The Significance of the Underlying District Court Order, Which the Fifth Circuit Improperly Insulated from Appellate Review, Strongly Weighs in Favor of Granting the Petition.

For the reasons set forth in the petition, *amici* agree with Monogram that the Fifth Circuit's interpretation of 28 U.S.C. § 1447(d) conflicts with decisions of several other circuits and should be reviewed by this Court. As explained below, *amici* also agree that the national significance of the district court's underlying remand order provides a compelling reason for this Court to review the Fifth Circuit's decision.

Section 27 of the FDIA, 12 U.S.C. § 1831d(a), permits a "State bank" to rely on the laws of its home state in charging "interest" (including late fees) on loans made to out-of-state residents.[2] It is undisputed that Monogram assessed late fees on its credit card loans to Heaton in accordance with the laws of Georgia, Monogram's home state. Accordingly, Monogram's late fees were lawful under Section 27 and were immune from challenge under Louisiana law if Monogram qualified as a "State bank" under the FDIA. *See* Pet. 4-5.

The district court held that Monogram did *not* qualify as a "State bank" under the FDIA, because Monogram accepted deposits from its parent company but not from the general public. The district court declared that Monogram was not "engaged in the business of receiving deposits, other than trust funds" and, therefore, could not be a "State bank" under the FDIA. *See* Pet. App. 20a-22a; 12 U.S.C. §§ 1813(a)(2), (c)(2) & (c)(5); *id.* § 1815(a)(1). Consequently, the district

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[2] *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993). *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (upholding the authority of a national bank, under 12 U.S.C. § 85, to charge "interest" (including late fees) permitted by the laws of its home state on loans made to residents of other states).

court held that Section 27 did not preempt Heaton's claims against Monogram under Louisiana's Consumer Credit Law, and that the case should be remanded to state court for lack of federal jurisdiction. *See* Pet. App. 20a-22a; 12 U.S.C. § 1831d(a).

In holding that Monogram was not a "State bank" under the FDIA, the district court refused to defer to the FDIC's consistent position that Monogram has been a "State bank" eligible for deposit insurance ever since Monogram received its state bank charter in 1988. Indeed, during the district court proceedings, the FDIC submitted a letter confirming Monogram's status as an FDIC-insured "State bank." *See* Pet. App. 2a-3a. Subsequently, the FDIC's Board of Directors approved the publication of an opinion of its General Counsel, stating that (i) state-chartered banks similar to Monogram qualify as "State banks" eligible for deposit insurance under the FDIA, even if they accept deposits only from affiliates and not from the general public, and (ii) the district court's contrary interpretation of the FDIA was "irrational."[3]

The FDIC General Counsel's opinion pointed out that the district court's interpretation of the meaning of "State bank" was contrary to an earlier decision of the Second Circuit Court of Appeals.[4] The opinion also observed that the

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[3] FDIC General Counsel's Opinion No. 12, 65 Fed. Reg. 14,568, 14,571 (2000). The FDIC has recently published notice of a proposed regulation that would incorporate the legal position set forth in its General Counsel's Opinion No. 12. *See* FDIC Notice of Proposed Rulemaking, "Being Engaged in the Business of Receiving Deposits Other Than Trust Funds," 66 Fed. Reg. 20,102 (2001).

[4] *See* FDIC General Counsel's Opinion No. 12, *supra* note 3, at 14,570, citing *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995). In *Meriden Trust*, the Second Circuit held that a state-chartered bank was a "State bank" and an "insured depository institution" under the FDIA, even though the bank held only two FDIC-insured deposits (both of which were owned by affiliates) and engaged solely in a trust business. *See* 62 F.3d at 451-54.

district court's ruling could "lead to the existence of State depository institutions that are insured by the FDIC but unregulated by every section of the [FDIA]."[5] The FDIC had previously warned the district court that its ruling as to Monogram "may affect hundreds of similarly situated FDIC-insured institutions processing billions of dollars in transactions."[6]

The Fifth Circuit acknowledged that "the merits of this case present significant questions of law concerning the interpretation of the FDIA and the ability of the courts to 'second-guess' the FDIC's determinations about whether financial institutions are 'state banks' under the FDIA." Pet. App. 11a. However, based on its erroneous construction of 28 U.S.C. § 1447(d), the Fifth Circuit declined to address these crucial issues under the FDIA and dismissed Monogram's appeal. Following the Fifth Circuit's decision, the district court denied the FDIC's motion to intervene as a party defendant and again issued an order remanding the case to state court. In its second remand order, the district court expressly *reaffirmed* its conclusion that Monogram is not a "State bank" under the FDIA.[7]

Both courts below stated that the district court's construction of the FDIA would have "no preclusive effect" on subsequent state court proceedings.[8] Nevertheless, the district court's twice-articulated interpretation of "State bank"

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[5] *See* FDIC General Counsel's Opinion No. 12, *supra* note 3, at 14,571.

[6] Memorandum of Points and Authorities in Support of the Federal Deposit Insurance Corporation's Motion for Leave to Intervene as a Party Defendant, at 4 (filed with the district court on Nov. 22, 1999), *quoted in* Pet. 10.

[7] *Heaton v. Monogram Credit Card Bank of Georgia*, 2001 WL 15635, at *1-*3 (E.D.La., Jan. 5, 2001).

[8] *See id.* at *3 n.3 (district court's remand order); Pet. App. 11a (Fifth Circuit's decision dismissing Monogram's appeal).

under the FDIA is likely to create substantial uncertainty and confusion within the state banking system.[9] The district court's orders have already received extensive coverage in the national financial press.[10] As shown below, the district court's unfounded construction of the FDIA poses a serious challenge to the vitality of core congressional policies inherent in the FDIA. Accordingly, there is a compelling reason for this Court to review and overturn the Fifth Circuit's decision, thereby permitting Monogram to obtain federal appellate review of the district court's ruling.

II. Federal Appellate Review of the District Court's Ruling Is Urgently Needed, Because That Ruling Threatens to Undermine Important Congressional Policies Embodied in the Federal Deposit Insurance Act.

For three reasons, the district court's interpretation of "State bank" does violence to fundamental principles of the FDIA. First, the ruling would destroy, with respect to state-chartered credit card banks, the competitive parity that Congress has mandated in the charging of "interest" on loans by national banks and FDIC-insured state banks. Second, the ruling rejects the FDIC's determination of a state bank's qualification for deposit insurance and, in so doing, ignores the FDIA's prescribed procedures for revoking the insured status of a state bank. Third, the ruling threatens to disrupt

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[9] *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,104-05 (expressing the FDIC's view that the "uncertainty" created by the district court's ruling "could produce irrational and harmful results").

[10] *See, e.g.*, Rob Garver, "FDIC Warns of Litigation Flood as Case Proceeds Challenging Card Bank Status," American Banker, Jan. 3, 2000, at 1; R. Christian Bruce, "Fifth Circuit Dismisses Appeal in Case That Could Have Clarified Late Charges," 75 BNA's Banking Report 629 (Nov. 13, 2000); Paul Beckett, "Clashing Interest: Why Patricia Heaton Could Cause Problems For a GE-Owned Bank," Wall Street Journal, Mar. 30, 2001, at A1; Rob Blackwell, "To Quell Lawsuit, FDIC Offers Clearer State Bank Definition," American Banker, April 11, 2001, at 1.

the FDIA's carefully-wrought system of dual state and federal regulation for FDIC-insured state banks.

1. Section 27 of the FDIA was enacted in 1980 to remove the competitive inequality that previously existed between state banks and national banks in the charging of "interest" on loans. Under 12 U.S.C. § 85, a national bank may charge interest either (i) at the annual rate of one percent over the applicable Federal Reserve discount rate on 90-day commercial paper, or (ii) at the highest rate permitted to the "most favored lender" under the laws of the state where the national bank is located. In addition, under the "exportation" doctrine, Section 85 allows a national bank to charge "interest" permitted by the laws of its home state to borrowers residing in other states.[11] In *Smiley, supra,* this Court held that the term "interest" in Section 85 includes late fees charged on credit card loans – the same type of fees that are the subject of Heaton's lawsuit against Monogram.

Until 1980, state banks were at a significant competitive disadvantage in making loans, because they did not have interest-charging powers comparable to those granted by Section 85 to national banks. Congress adopted Section 27 of the FDIA for the specific purpose of establishing competitive equality between national banks and FDIC-insured state banks in the charging of "interest" on loans.[12] Section 27 expressly declares that its purpose is "to prevent discrimination against State-chartered insured depository institutions," and Section 27 grants to such institutions the same rights to charge interest that national banks enjoy under Section 85. *See* 12 U.S.C. § 1831d(a). The legislative history

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[11] *See Smiley,* 517 U.S. at 737, 744 (discussing "exportation" power granted to national banks under Section 85); *Marquette National Bank v. First of Omaha Service Corp.,* 439 U.S. 299, 308-19 (1978) (same, and also explaining the "most favored lender" status enjoyed by national banks under Section 85, *see id.* at 314 n.26).

[12] *See Greenwood Trust,* 971 F.2d at 826-27; *Hill v. Chemical Bank,* 799 F. Supp. 948, 951-52 (D. Minn. 1992).

of Section 27 confirms that the statute was intended to establish "parity, or competitive equality" between national banks and FDIC-insured state banks with respect to their ability to charge "interest."[13] Federal and state courts have subsequently held that Section 27, like Section 85, permits a covered bank to rely on the laws of its home state in charging late fees on credit card loans made to out-of-state residents.[14]

Only "State banks" and other "insured depository institutions" are entitled to exercise the interest-charging powers granted under Section 27. In contrast, Section 85 applies to *all* national banks, regardless of their status as FDIC-insured institutions. Thus, a national credit card bank is *not* required to maintain federal deposit insurance in order to charge "interest" (including late fees) based on its home state laws for loans made to out-of-state customers.

The district court's ruling that Monogram is not a "State bank" under the FDIA would strip Monogram – and, by logical extension, all similar state-chartered credit card banks – of their ability to rely on Section 27. Accordingly, the district court's erroneous interpretation of the FDIA could destroy competitive parity among state and national credit card banks and greatly erode the value of a state charter for such banks. State-chartered credit card banks would confront powerful economic and operational incentives to convert to national bank charters in order to retain their interest-charging powers under federal law. Such a result would undermine the dual chartering and regulatory system for credit card banks,

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[13] *See, e.g.*, 126 Cong. Rec. 6900 (1980) (remarks of Sen. Proxmire, Senate floor manager for the 1980 legislation); *id.* at 6907 (remarks of Sen. Bumpers).

[14] *See Greenwood Trust*, 971 F.2d at 829-31; *Hill*, 799 F. Supp. at 952-53; *Hunter v. Greenwood Trust Co.*, 640 A.2d 855 (N.J. App. 1994); *reversed*, 668 A.2d 1067 (N.J. 1995), *reinstated*, 679 A.2d 653 (N.J. 1996).

thereby frustrating the manifest intent of Congress in adopting Section 27.[15]

2. In holding that Monogram was not a "State bank," the district court improperly refused to follow the FDIC's determination that Monogram satisfied the statutory criteria for "State bank" status under the FDIA. The FDIC's position, as subsequently explained in its General Counsel's Opinion No. 12, was entitled to judicial deference because it reflected the long-established and consistent practice of the agency in interpreting the statute it is charged to administer.[16]

The district court committed an even more serious error by allowing a private litigant to attack Monogram's status as a "State bank" without following the prescribed administrative procedures for terminating the deposit insurance of a state bank. By asserting that Monogram could not qualify as a "State bank" under the FDIA, Heaton effectively challenged Monogram's eligibility for deposit insurance. The FDIA provides that a state-chartered bank may *not* be treated as a "State bank" *or* as an "insured depository institution" *unless* it is "engaged in the business of receiving deposits, other than trust funds." *See* 12 U.S.C. §§ 1813(a)(1)(A), (a)(2) & (c)(2); *id.* § 1815(a)(1). Heaton's central claim, which the district

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[15] *See Greenwood Trust*, 971 F.2d at 826-27, 830; *Hill*, 799 F. Supp. at 951-52.

[16] *See* FDIC General Counsel's Opinion No. 12, *supra* note 3 (describing the legal considerations supporting the FDIC's "consistent practice," during a period of "more than 30 years," *id.* at 14,572, of treating state-chartered institutions similar to Monogram as "State banks" under the FDIA); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (holding that the FDIC's "longstanding policy" of excluding certain promissory notes from the definition of "deposit" in the FDIA should be given "considerable weight," even though that policy "ha[d] not been reduced to a specific regulation"); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that agency opinions that are not the product of a formal adjudication or a notice-and-comment rulemaking are still "entitled to respect" to the extent that they have the "power to persuade").

court accepted, was that Monogram was not "engaged in the business of receiving deposits" because it accepted deposits only from its parent company and not from the general public. *See* Pet. App. 2a, 5a. Thus, as a logical matter, Heaton's claim directly challenged Monogram's right to maintain its status as an insured bank under the FDIA.[17]

Under the FDIA, proceedings to terminate a bank's deposit insurance – *including* proceedings to terminate a bank's insured status for failure to engage in the "business of receiving deposits" – must be brought by the FDIC in accordance with prescribed statutory standards. 12 U.S.C. §§ 1818(a), (p) & (w). The FDIC has adopted detailed administrative procedures to implement the statutory requirements for deposit insurance terminations. *See* 12 C.F.R. §§ 308.119 - 308.124.

The district court improperly allowed Heaton to circumvent this congressionally established regime for deposit insurance terminations. As shown above, Heaton's lawsuit represented an unauthorized collateral attack on Monogram's eligibility to maintain its insured status. Given the FDIA's clear mandate, Heaton should have been required to file an administrative petition requesting the FDIC to determine whether Monogram's status as an insured "State bank" should be terminated under 12 U.S.C. § 1818(p).[18] In a closely similar case, this Court held that a private litigant could not sue in district court to attack a bank holding company acquisition that had received the approval of the Federal

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[17] *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,103 (confirming that any bank that fails to satisfy the "threshold statutory requirement" of being "engaged in the business of receiving deposits" would be "ineligible for deposit insurance").

[18] In fact, *amicus* CSBS recently followed this approach in petitioning the FDIC to adopt a regulation that would incorporate the legal interpretation of "State bank" set forth in FDIC General Counsel's Opinion No. 12. *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,105-06.

Reserve Board (the "Board"). This Court concluded, based on the provisions of the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.* ("BHCA"), that all challenges to bank holding company acquisitions must first be raised in administrative proceedings before the Board. *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 417-23 (1965). *Whitney* specifically rejected "the notion that the Board's determination [under the BHCA] may be collaterally attacked in District Court." This Court declared that the Board should be allowed to "make the determination of the plan's propriety in the first instance," because the Board's "vital role" in administering the BHCA "makes its views of particular benefit to the courts." *Id.* at 421-22. Thus, under *Whitney*, the district court should have dismissed Heaton's challenge to Monogram's status as an insured "State bank" and should have directed Heaton to exhaust her administrative remedies before the FDIC.[19]

Unless overturned, the district court's ruling could undermine the integrity and reliability of FDIC determinations regarding the insured status of state banks. By holding that Monogram's limited deposit-taking activities prevented it from qualifying as a "State bank" under the FDIA, the district court called into question the expert judgment of the FDIC as to the eligibility of similar state-chartered credit card banks and limited-purpose trust companies to receive deposit insurance. In *Meriden Trust*, the Second Circuit rejected a comparable attempt by a state bank

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[19] In *Whitney*, this Court pointed out that Congress had "enacted a specific statutory scheme for obtaining review" of Board determinations under the BHCA. The Court therefore held that "the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to." 379 U.S. at 422. Congress has similarly provided for statutory review (in federal district courts) of the FDIC's administrative decisions under the FDIA. *See* 12 U.S.C. §§ 1819(a)(Fourth) & (b)(2)(A). Accordingly, Heaton's right to obtain judicial review would not have been prejudiced in any way by a requirement that she exhaust her administrative remedies under the FDIA.

to challenge its continuing status as an insured "State bank." In that case, the plaintiff bank, like Heaton, filed suit after failing to follow the FDIA's prescribed statutory procedures for cancelling its deposit insurance. *See* 62 F.3d at 453 (citing 12 U.S.C. §§ 1818(a) & 1828(i)(3)). The Second Circuit concluded – in terms that are equally applicable to this case – that the integrity of the FDIC's regulatory authority would be seriously compromised if the status of banks could be changed "from 'insured' to 'noninsured' at will" through litigation conducted outside the boundaries of the FDIA's statutory scheme. *Id.*

3. The district court's ruling also threatens to disrupt the FDIA's dual system of state and federal regulation for state-chartered credit card banks and similar limited-purpose institutions (including trust companies) that qualify as "State banks" and obtain deposit insurance. Under the FDIA, insured "State banks" continue to operate under the primary supervision of their respective state banking commissioners.[20] However, the FDIA also provides for the examination and supervision of insured "State banks" by designated federal banking agencies.[21] This complementary layer of federal regulation is designed, *inter alia*, to maintain public confidence in FDIC-insured state banks and to preserve the solvency of the deposit insurance fund. *See, e.g., First State Bank of Hudson County v. United States*, 599 F.2d 558, 562-63 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The

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[20] *See, e.g.*, 12 U.S.C. § 1813(r)(1); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 679 (5th Cir. 1979) (the FDIA recognizes that "State banks are chartered by the States, and are operated under State laws, and are responsible first and foremost to the officials of the States which created them").

[21] The Board is the responsible federal regulator for insured state banks that are members of the Federal Reserve System, while the FDIC is the responsible federal regulator for insured state nonmember banks. *See* 12 U.S.C. §§ 1813(q)(2) & (3). The responsible federal regulators have examination authority over insured state banks under 12 U.S.C. §§ 325 (state member banks) & 1820(b) (state nonmember banks).

FDIA's provisions, and federal regulations adopted thereunder, supplement state laws in important areas such as ensuring capital adequacy, preventing unsound banking practices, and restricting transactions with affiliates and loans to insiders.[22]

The FDIA thus preserves the primary supervisory authority of state bank regulators over "State banks" but also establishes a significant supporting role for federal agencies.[23] By declaring that Monogram was not a "State bank" under the FDIA, the district court necessarily indicated that the FDIA's entire supervisory regime was inapplicable to Monogram and similar state-chartered, limited-purpose banks.[24] Consequently, with respect to those banks, the district court's ruling could destroy the careful balance between state and federal regulation established by the FDIA .

State bank regulators rely on the FDIC's approval of deposit insurance as a strong indicator that each insured state bank will maintain a safe and sound operating condition. Indeed, some states require their regulators to revoke the charter of any state bank that fails to maintain its insured status.[25] The district court's ruling has created significant and undesirable confusion about the insured status of Monogram and similar limited-purpose state banks. Unless that ruling is overturned, many state bank regulators will have to consider whether they must adopt additional safety and soundness rules

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[22] *See, e.g.*, 12 U.S.C. §§ 1818 & 1828(j); 12 C.F.R. Parts 208 & 325.

[23] *See, e.g., In re Southern Industrial Banking Corp.*, 872 F.2d 1257, 1260 (6th Cir. 1989); *Investment Co. Institute v. FDIC*, 728 F.2d 518, 524-25 (D.C. Cir. 1984).

[24] *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,104-05 (noting that, based on the district court's ruling, a state bank approved for deposit insurance by the FDIC could potentially claim the right to operate "free from the restrictions imposed by section 24" of the FDIA, 12 U.S.C. § 1831a, on the permissible activities of insured state banks).

[25] *See, e.g., id.* at 20,104 (citing Florida and Virginia statutes).

or seek new legislation to offset the threatened loss of supplemental federal regulation under the FDIA. Given the nationwide significance of the district court's decision, state authorities should not be required to contemplate far-reaching changes to their banking codes until the district court's misguided construction of the FDIA has received full appellate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 00-1505

In the
Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,

v.

PATRICIA HEATON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

Amici Curiae American Financial Services Association, American Bankers Association, and Consumer Bankers Association respectfully submit this brief in support of Petitioner Monogram Credit Card Bank[1]:

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[1] Pursuant to Supreme Court Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the AFSA, the ABA, and the CBA represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than AFSA, ABA, CBA, and their members made a monetary contribution to the preparation or submission of this brief. Petitioner's parent company, General Electric Capital Corporation,

INTEREST OF *AMICI CURIAE*

The American Financial Services Association ("AFSA") is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA's mission is "to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the responsible delivery and use of credit-related products."

Organized in 1916, AFSA represents about 360 companies operating more than 10,000 offices engaged in extending $200 billion or about 15 to 20 percent of all consumer credit in the United States. AFSA's members include credit card issuers, independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies. They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and

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is an AFSA member, but it did not make a monetary contribution to the preparation or submission of this brief beyond ordinary payment of its yearly AFSA dues.

community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The Consumer Bankers Association ("CBA") is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer finance (auto, home equity and education), electronic retail delivery systems, bank sales of investment products, small business services, and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters—including 85% of the nation's fifty largest bank holding companies—with assets totaling more than $2.9 trillion.

The AFSA, the ABA and the CBA frequently appear as *amici curiae* in cases raising issues of widespread importance and concern to banks and the consumer finance industry. They wish to appear in this case for two reasons.

First, the district court's underlying substantive ruling has ramifications of profound importance to AFSA, ABA, and CBA members across the country whose deposits are federally insured. The district court held that petitioner Monogram Credit Card Bank of Georgia was not a "state bank" under the Federal Deposit Insurance Act (12 U.S.C. § 1813(a)(2))—despite the FDIC's previous finding that it was. That ruling leaves institutions like Monogram (not to mention their customers) uncertain of whether their deposits remain federally insured, of the source and scope of the legal restraints on their activities, and, in some cases, of whether they are even entitled to continue their operations.

The Fifth Circuit's refusal to review the district court's order only compounded these problems. The issue has now

been remanded for re-determination by a state court, whose decision may or may not be adopted by other state courts, paving the way for inconsistent rulings on a uniquely federal question of law. The deposit institutions and the public need assurance that federal banking laws will be uniformly interpreted and applied *in a federal forum*, and that deposits, once found to be federally insured, will remain so.

Second, the question of the scope of appellate review of district courts' remand orders has perhaps a broader impact on the financial services industry than on any other. Most AFSA, ABA and CBA members are very heavily regulated by federal law. For that reason, they frequently seek removal to federal court, based on federal preemption, of lawsuits improperly commenced against them in state courts. They have a significant interest in obtaining a federal forum for resolution of the important federal questions most lawsuits against them (including this one) raise—as well as a uniform standard for appellate review of district courts' remand orders. The Fifth Circuit's overly narrow construction of 28 U.S.C. § 1447(d) curtails federal appellate review of important questions of federal law far more strictly than this Court's precedents warrant.

The AFSA, the ABA, and the CBA respectfully ask this Court to intervene and grant this petition.

REASONS FOR GRANTING THE PETITION

For the reasons stated in the Brief of Amicus Curiae Conference of State Bank Supervisors, the underlying remand order carries profound consequences for the banking industry. It threatens to destroy the competitive parity Congress meant to create between national banks and federally-insured state banks; it strips state banks of the procedural safeguards that

are supposed to protect against improper termination of their federally-insured status; it endangers Congress' carefully-crafted system of dual state and federal regulation of state banks. The AFSA, the ABA and the CBA join wholeheartedly in all points raised in the CSBS's amicus brief.

From the standpoint of the regulated banks, the district court's order creates uncertainty in crucial aspects of their operations.

The most serious question banks like Monogram must face in light of the district court's order is whether they retain their federally-insured status. Because being "engaged in the business of receiving deposits" is a threshold prerequisite to eligibility for federal deposit insurance, all federally-insured institutions—not just "state banks"—will face this question. *See* 12 U.S.C. § 1815(a)(1). Practically speaking, an institution will have to reassess not only whether it is "engaged in the business of receiving deposits," but also whether it continues to satisfy the other prerequisites to eligibility for federal deposit insurance.[2] After all, what the district court's order means is that, although the FDIC may have found long ago that a particular institution qualifies for federal deposit insurance, that prior finding can be collaterally challenged at any time, in any state or federal court, by any disgruntled bank customer.

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[2] *See, e.g.*, 12 U.S.C. § 1816 (listing factors the FDIC is to consider in determining whether to approve an institution's application for federal deposit insurance); FDIC Statement of Policy on Applications for Deposit Insurance, 63 Fed.Reg. 44752, 44756 (Aug. 20, 1998) (describing factors the FDIC considers in granting insurance).

In other words, because of the district court's order, neither the banks nor their customers can rely on the FDIC's deposit insurance determinations—even long-standing ones. The FDIC is no longer, apparently, the sole authority with power to decide whether an institution is "engaged in the business of receiving deposits." *See* 12 U.S.C. § 1818(p). Banks will no longer enjoy the procedural safeguards Congress included in the FDIA, designed to protect banks and their customers from sudden revocation of federal deposit insurance. *See id.*; 12 C.F.R. § 308.124. The district court's remand order strips away the procedural safeguards Congress intended to impart to banks, impacting both the banks and the public.

The district court's holding that Monogram is not a "state bank" for purposes of Section 27 of the FDIA will wreak particular havoc on banking operations. Under section 27, federally-insured state banks may charge interest as permitted by the laws of their home states, even on loans to out-of-state consumers. 12 U.S.C. § 1831d(a). In reliance on the FDIC's determination that they are "state banks" within the meaning of Section 27, state banks like Monogram have entered into a wide variety of credit transactions with consumers, using the imported interest rates of their home states.

The district court's ruling puts banks like Monogram in an untenable position. Many may decide to convert from state banks to national banks, to retain the interest rate protections allowed by Section 27.[3] Meanwhile, the banks may be subjected to a flood of usury lawsuits, as borrowers

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[3] *See* 12 U.S.C. § 85; *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (holding that national banks may charge interest as permitted by the laws of their home states).

from other states seek the often harsh penalties state usury laws impose. The banks may have to re-tool their interest rate provisions on a state-by-state basis, or stop doing business in certain states altogether, drastically limiting the availability of consumer credit to residents of states with particularly strict usury laws.

The district court's ruling raises a host of other questions for state banks like Monogram, most of which are unanswerable without more litigation. If they are no longer "state banks" for purposes of section 27, do their deposits remain federally insured? Does the rest of the FDIA still govern their activities? If not, what laws do? Must they comply with inconsistent state laws or face the wrath of the state banking agencies? Are there gaps in state regulations that the federal ones no longer fill? Is the bank even entitled to continue operating under its state charter?[4]

These questions will likely be answered through case-by-case adjudication in the courts of the several states, which may or may not be inclined to develop a uniform body of answers. If the Fifth Circuit's ruling is allowed to stand, the issues will not be reviewable in a federal forum. Banks like Monogram will have even greater incentives to convert from state bank to national bank charters, or, at a minimum, will tend to gravitate toward those states whose courts have rendered favorable rulings on these questions.

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[4] "[T]he depository institution is often required by its chartering authority to obtain federal deposit insurance as a condition to conducting business. *See, e.g.*, Fla. Stat. 658.995(3); Va. Code 6.1-392.1.A.4." FDIC Notice of Proposed Rulemaking: "Being Engaged in the Business of Receiving Deposits Other Than Trust Funds," 66 Fed. Reg. 20, 201 (2001).

In short, the district court's remand order, and the Fifth Circuit's refusal to review it, creates monumental problems for our country's banking system. Banks like Monogram must be able to rely on the FDIC's determination that they are "engaged in the business of receiving deposits" within the meaning of the FDIA, and that their status as federally-insured depository institutions will not be stripped away unless and until the FDIA's carefully-devised procedures are followed. Both the banks and the public need to know that federal banking laws will be applied consistently, and that, once insured, their deposits will remain so.

The importance of these issues to the national banking system warrants this Court's intervention and review.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be granted.

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REPLY BRIEF FOR PETITIONER

Respondent nowhere disputes that there is a square and acknowledged conflict among the circuits regarding whether a district court's invocation of 28 U.S.C. § 1447(c) in a remand order operates as "magic words" that conclusively insulate that order from review. Instead, she urges the Court not to resolve the conflict in this case, asserting incorrectly that the ruling of the Fifth Circuit does not implicate the conflict or has become moot.

These arguments are entirely meritless. The Fifth Circuit expressly invoked the "magic words" doctrine in refusing to consider the impact on reviewability of the district court's dismissal of respondent's federal Truth-in-Lending Act ("TILA") claim, thus applying the precise rule that has been rejected in every other circuit that has considered the issue. Moreover, the case plainly is not moot. Monogram continues to be denied its congressionally mandated right to defend this case in federal court, and a favorable decision from this Court would allow that right to be vindicated. Accordingly, this Court should grant Monogram's petition for a writ of certiorari.

1. Respondent's principal argument is that the Fifth Circuit did not apply the magic words doctrine, and that the petition thus "does not present the question raised by Petitioner." Br. in Opp. 14. This is merely wishful thinking. The Fifth Circuit's opinion could not have been clearer:

> Monogram urges us to conduct an independent review of the remand order to determine the "true" basis for the remand. However, we note that in *Bogle* [*v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994)], looking at the face of the remand order we stated: "The

> magic words 'this case does not contain a federal claim' rendered the district court's remand order unreviewable."

Pet. App. 8a.

Respondent's argument to the contrary is premised on the observation that the Fifth Circuit "painstakingly reviewed the language of the remand order" and concluded that the district court "'clearly intended to base his order on § 1447(c).'" Br. in Opp. 15. That is precisely our point. The court of appeals acknowledged that the district court had subject matter jurisdiction and plainly erred in its invocation of § 1447(c). Yet the Fifth Circuit refused to review the remand order simply because the order cited, albeit erroneously, § 1447(c).

Indeed, Monogram does not dispute that the district court intended to invoke, and actually did invoke, § 1447(c). The critical point is that the court did so only after asserting subject matter jurisdiction over the case and dismissing respondent's TILA claim with prejudice. Respondent does not contest that when a district court dismisses a federal claim with prejudice and then remands any remaining state claims, that order is reviewable. The issue before the Fifth Circuit, and the issue before this Court now, is whether a different result is required when the district court does so, but then utters the magic words "lack of subject matter jurisdiction." The Fifth Circuit held, citing *Bogle*, that the invocation of those magic words did indeed preclude appellate review. In so doing, it created a conflict with every other circuit – seven in all – to have addressed the issue.

As pointed out in Monogram's petition, the Fifth Circuit's explicit refusal to examine the "'true' basis" of the remand order – rather than that expressed by the district court – is flatly contrary to numerous cases holding that the label the district court puts on its order is not conclusive of reviewability, and that appellate courts have an independent obligation to consider the district court's action "not by the name the court gave (its decision) but by what in legal effect it actually was." *United States v. Sisson*, 399 U.S. 267, 279 n.7 (1970), *cited in* Monogram Pet. 21; *see generally* Monogram Pet. 21-23.

Respondent suggests weakly that a few of the cases relied on by Monogram are distinguishable because the orders either did not contain reasons or were "facially ambiguous" as to why the remand was granted. *See* Br. in Opp. 17.[1] But that argument misses the point. The district court's order in this case was internally contradictory, precisely because the court dismissed the federal TILA claim with prejudice – an action that required jurisdiction – while purporting to remand the action to state court for lack of jurisdiction. The fact that there was no ambiguity in the court's invocation of § 1447(c) – the point that respondent emphasizes – is entirely irrelevant.

In any event, there is no doubt that the magic words approach applied by the Fifth Circuit conflicts with the analysis in cases like *Mangold v. Analytic Serv., Inc.*, 77 F.3d

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[1] Oddly, two of the five cases purportedly "distinguished" by respondent do not even appear in Monogram's petition. *See* Br. in Opp. 17 (citing *Transit Casualty Co v Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997), and *Zuniga v Blue Cross & Blue Shield of Michigan*, 52 F 3d 1395 (6th Cir. 1995)).

1442 (4th Cir. 1996). As noted in the petition, *see* Monogram Pet. 14 n.8, the dissent in *Mangold* explicitly invoked the Fifth Circuit's magic words doctrine, and the majority explicitly held that a court of appeals has the "power – and responsibility" to look past even specific citations to § 1447(c) to determine the "actual basis being invoked as authority for remand." *Id.* at 1452; *see also Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997) ("Mere mention of § 1447(c) or the 'magic words' of subject matter jurisdiction, however, do not automatically render a remand order nonreviewable under § 1447(d)."); *Carvel v. Thomas and Agnes Carvel Foundation*, 188 F.3d 83, 85-86 (2d Cir. 1999) (reviewing remand order after concluding, notwithstanding the district court's characterization of its own order, that the order was based on abstention, not lack of subject matter jurisdiction). *See generally* Monogram Pet. 14-17 (citing other cases).

In short, the Fifth Circuit examined the remand order to determine whether the district court *thought* it had subject-matter jurisdiction and then relied solely on magic words in refusing to determine what the district court actually *did*. *Cf. Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Rehnquist, J., dissenting) (noting that the necessary consequence of *Thermtron* is that the Court would have jurisdiction to review a remand order in which the district court "state[s] that it finds no jurisdiction, using the rubric of § 1447(c), but the papers plainly demonstrate such a conclusion to be absurd"). The conflict in the circuits is thus squarely presented.

2. Respondent also argues that the "petition should be denied as moot." Br. in Opp. 18. The principal basis for this contention is the FDIC's ongoing effort – thus far

unsuccessful – to intervene in state or federal court.[2] The FDIC contends (and Monogram agrees) that the FDIC's intervention would allow the federal district court to exercise subject matter jurisdiction over the case. *See* 12 U.S.C. § 1819(b)(2)(A).

Nothing in the FDIC's intervention efforts renders this petition moot, because the case has *not* been moved to federal court. If this Court were to reverse the Fifth Circuit's reviewability decision, the merits of the remand order would then be before the Fifth Circuit, and the Fifth Circuit could (and likely would) reverse that order. The case would then proceed in federal court instead of state court. Right now, however, the FDIC's efforts have been unsuccessful, and this case remains in state court. Thus, Monogram's pursuit of its right to a federal forum most plainly is not moot.

To be sure, the case would become moot if a state or federal court were to grant the FDIC the right to intervene and the case were removed to federal court. But respondent's reliance on that possibility is particularly ironic given that respondent has vigorously opposed the FDIC's efforts to intervene to defend against respondent's attack on its regulatory scheme. In any event, this is merely speculation about future events. No court has allowed the FDIC to intervene, and the possibility that one someday might provides no basis for denial of certiorari now. This case

[2] That effort is currently focused on a pending appeal to the Fifth Circuit by the FDIC and a pending motion filed by the FDIC in state court.

presents a mature decisional conflict on an important issue of federal law and should be reviewed now.[3]

3. Respondent's remaining arguments merit little comment. Respondent suggests, for example, that Monogram has somehow "waived" its right to seek review of the Fifth Circuit's decision by attempting to remove the case to federal court a second time. That is nonsense. Monogram has consistently maintained that the Fifth Circuit's refusal to review the district court's remand order was erroneous. For that reason, even as it filed its second notice of removal, Monogram filed a timely petition for rehearing and then a timely petition for certiorari. In the interim, however, this case was not stayed, and thus Monogram pursued an entirely legitimate course of action aimed at protecting its interests in the event its efforts to seek further review of the Fifth Circuit's ruling were unsuccessful.[4]

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[3] Respondent spends a significant portion of the Brief in Opposition setting forth her view that the FDIC has somehow acted improperly in supporting Monogram in this case. Although Monogram strongly disagrees with respondent's characterization of the FDIC's actions, respondent's attack is entirely irrelevant to the reviewability issue currently before this Court, and we thus will not now burden the Court with a detailed response. Suffice it to say, the principal FDIC action on which Monogram relies to establish its status as a state bank was taken in *1988*, many years before any of the events relating to this litigation and ten years before respondent filed her initial complaint.

[4] There is no small measure of irony in respondent's reliance on the second removal to claim that Monogram has waived review of the Fifth Circuit's decision. The Fifth Circuit's decision explicitly invited Monogram to remove its case to federal court on the basis of the TILA claim. Pet. App 12a & n 6. Monogram merely accepted that invitation, only to learn that respondent, by obtaining from the state court an *ex parte* dismissal of the TILA claim on the day the Fifth Circuit's decision was announced, had subverted the clear intent of that Circuit

Respondent also suggests that if Monogram prevails, "the appellate floodgates will open and consistency will be lost." Br. in Opp. 19. But there is no evidence that the rule applied in every other circuit has opened the "floodgates" for appeals of remand orders or created some undescribed problem of "inconsistency." That rule only serves to assure that appealability turns on the reality of what the district court did, rather than the "magic words" it may erroneously have used. Only review by this Court of the Fifth Circuit's contrary rule can assure consistency in appellate review of remand orders. Accordingly, the Court should agree to review this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 00-1505

IN THE
Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,
v.
PATRICIA HEATON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Monogram Credit Card Bank of Georgia ("Monogram") respectfully files this Supplemental Brief to advise the Court of events that came to Monogram's attention after its Reply Brief had gone to the printer.

In her Brief in Opposition, respondent argued that Monogram's petition should be "denied as moot," in part because "the FDIC has sought to intervene in state court," and the grant of intervention would result in the case being "removed to federal court." Br. in Opp. 18. As Monogram argued in its reply, the petition is plainly not moot, and mere speculation that it might become so provides no basis for this Court to deny the petition. *See* Reply Br. 4-6. There is an additional reason to reject respondent's mootness concerns: the state court in Louisiana has denied the FDIC's motion to intervene. *See Heaton v. Monogram Credit Card Bank of Georgia*, Reasons for Judgment at 3 (Civ. Dist. Ct. May 18, 2001) (Supplemental Brief Appendix 5a).[1]

[1] The state court's opinion is dated May 18, 2001, but it was not received by Monogram until May 29, 2001, after the Reply Brief had been sent to the printer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SUPPLEMENTAL APPENDIX

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO- 98-8275 **DIVISION "D"**
SECTION 16

PATRICIA HEATON

VERSUS

MONOGRAM CREDIT CARD BANK OF GEORGIA

FILED: _____ DEPUTY CLERK: _____

REASONS FOR JUDGMENT

These Reasons for Judgment are issued in connection with the Court's decision to deny the Federal Deposit Insurance Corporation's ("FDIC") Motion for Leave to File Petition in Intervention.

I. FACTS

This case has a complicated procedural history. For purposes of these Reasons for Judgment, the Court adopts the history provided by plaintiff, which was uncontested by FDIC or defendant.

II. DISCUSSION

The parties agree the FDIC's request for leave to intervene presents two issues: First, under Louisiana Code of Civil Procedure 1033 will the intervention, if granted, retard the progress of the action. Second, under Civil Procedure article 1091, does the FDIC have the right to intervene? The Court addresses both issues below.

It is in the Court's discretion to decide whether the FDIC's intervention will retard the progress of the action. *Charia v. Allstate Insur. Co.*, 635 So. 2d 370 (La. App. 4th Cir. 1994). The Court finds that the FDIC's intervention will substantially retard the progress of the action and, as a result, denies the motion. The case is already three years old, having been filed in May 1998. The case has been removed on two separate occasions to federal court, once in 1998 and again in 2000. Each time the federal court has remanded the case to this Court. Counsel for Monogram admitted at oral argument that a third removal will result if the intervention is granted. A third removal may lead to further jurisdictional litigation and additional delay.

Permitting the FDIC to intervene at this point and remove the case would severely disrupt the proceedings. The Court has entered a Scheduling Order, with the consent of the parties, setting a hearing in June 2001 on defendant's dispositive motion and another in July 2001 on plaintiff's Motion for Class Certification. The Court believes this expedited schedule is appropriate because the case has bounced back and forth between state and federal court for the past three years.

In denying the FDIC's motion under Louisiana Civil Code article 1033, the Court has also considered the possible

prejudice to the parties. On the one hand, the Court finds plaintiff would be greatly prejudiced by a third removal of the case.

On the other hand, the FDIC is not prejudiced by the denial of its motion. The FDIC had ample opportunity to intervene earlier in the case, but failed to do so. The FDIC could have intervened in September 1998 when it learned of the case. Yet the agency did not. Instead, it relied on Monogram to represent its interests. Similarly, the FDIC could have sought to intervene between November 1999 and November 2000 when the case was pending in this Court after the first remand. Yet the agency did not do so.

Denying the intervention will not prohibit the FDIC from participating in the case. Ms. Heaton has agreed the FDIC may participate as amicus curiae in these proceedings. Because the FDIC has an interest in advising the Court on how the federal preemption issue should be handled, the Court invites the agency to participate in this fashion. The FDIC was satisfied to appear amicus curiae in the Fifth Circuit to protect its administrative interests. It makes no sense that the FDIC is now unsatisfied with this approach.

The Court also denies the FDIC's motion because the Court agrees with Judge Barbier's observations that the FDIC's intervention is solely an attempt to divest this Court of jurisdiction. The FDIC will add nothing as a party. The federal court has twice concluded that jurisdiction is better vested in state court. Like Judge Barbier, the Court is disturbed by the assistance the FDIC has repeatedly provided Monogram in these proceedings. The Court refers to the comments made by Judge Barbier at a hearing in December 2000, which are included in the record of this matter.

In addition, the FDIC is not prejudiced by the denial of its motion because its interests are being adequately represented by Monogram. Both the FDIC and Monogram are advancing the same interpretation of federal law, namely that Ms. Heaton's claims are preempted.

Lastly, the FDIC is not prejudiced because it has an appeal pending in the Fifth Circuit. The FDIC is protecting its federal interests in that federal forum.

The Court also concludes the intervention should be denied under Louisiana Civil Code article 1091. The Fourth Circuit has set forth the test for determining whether a party has a right to intervene. In *Amoco Production Co. v. Columbus Gas Transmission Corp.*, 455 So.2d 1260, 1264 (La. App. 4th Cir.), *writ denied*, 459 So.2d 542 (La. 1984), the Fourth Circuit made clear that a party seeking to intervene must have a justiciable right in the litigation, and the right must be "so related to the facts or object of the principal action that a judgment on the principal action will have a direct impact on the intervenor's rights."

The Court finds the FDIC does not have the right to intervene as a party under the unique circumstances presented here. The FDIC is not seeking redress or relief against either party and consequently does not have a justiciable right that will be directly impacted by the case. The FDIC essentially wants to advise the Court on how the federal statutes at issue should be interpreted. This interest does not warrant the FDIC becoming a party in the case. The FDIC has already set forth its legal arguments as amicus curiae and the FDIC may continued to do so here. The FDIC will add nothing of substance as a party, except to give defendant the opportunity to remove the case for a third time. For the foregoing reasons,

Touro Synagogue v. Goodwill Indus., 96 So.2d 29 (La. 1957), the case relied on by the FDIC, is inapplicable.

For the reasons assigned above, the FDIC's Motion for Leave to File Petition in Intervention is DENIED.

NEW ORLEANS LOUISIANA, this 18th day of May, 2001.

/s/
JUDGE